TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 100.

JOHN R. GREENAMEYER, APPELLANT,

vs.

ISAAC C. COATE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

FILED MAY 31, 1907.

(20,749.)

(20,749.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 346.

JOHN R. GREENAMEYER, APPELLANT,

vs.

ISAAC C. COATE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBUARRY 26, 1908.

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a No. 1727.

JOHN R. GREENAMEYER, Plaintiff in Error,
vs.
ISAAC C. COATE, Defendant in Error.

Appealed from the Supreme Court of Oklahoma to the Supreme Court of the United States of America.

b In the Supreme Court of the Territory of Oklahoma.

No. 1727.

JOHN R. GREENAMEYER, Plaintiff in Error,
vs.
ISAAC C. COATE, Defendant in Error.

In the Matter of the Appeal of JOHN R. GREENAMEYER.

To the Clerk of said Court:

Precipe for Copy.

You are directed to prepare and certify to the Supreme Court of the United States in the above matter the papers as follows:

1st.

The record in said action as received by you from the District Court of Kay County, Oklahoma.

2nd.

Copy of Opinion of the Supreme Court of Oklahoma, in the above action.

3rd.

The final judgment rendered in said cause by said Supreme Court.

4th.

A. Petition for Appeal and order allowing same.
B. Assignment of errors.
C. Bond on Appeal.
D. Citation on Appeal and service thereof.

WILLIAM KIETH AND
KOS & V. HARRIS,
Attorneys for Appellant.

Endorsed: No. 1727. John R. Greenameyer, plaintiff in error *vs.* Isaac C. Coate, defendant in error. Precipe for Copy. Filed Apr. 24, 1907. Benj. F. Hegler, Clerk Supreme Court.

c UNITED STATES OF AMERICA. ss.

To Isaac C. Coate, Greeting:

Whereas John R. Greenameyer has lately appealed to the Supreme Court of the United States, from a judgment lately rendered in the Supreme Court of the Territory of Oklahoma against him and in favor of you, the said appellees, and the said John R. Greenameyer has filed security as required by law and has perfected his appeal as required by law,

You are, therefore cited to appear before the Supreme Court of the United States of America, at the City of Washington, in the District of Columbia on the 22nd day of May, 1907, to do and receive what may appertain to justice which may be done in the premises.

Given under my hand at the City of Guthrie, Territory of Oklahoma, this 23rd day of April, One Thousand Nine Hundred and Seven.

[Seal Supreme Court, Territory of Oklahoma.]

JNO. H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma and Presiding Judge of Said Court.

Attest:
BENJ. F. HEGLER,
Clerk Supreme Court.
By JESSIE PARDOE, *Deputy.*

Service of a copy of the within Citation is hereby admitted this 27 day of April, 1907.

C. Z. PURNHAM,
CLINE & DUVAL,
By W. S. CLINE,
Attorneys for Defendant in Error.

[Endorsed:] No. 1727. John R. Greenameyer, Plaintiff in error *vs.* Isaac C. Coate, Defendant in error. Citation. Filed April 29, 1907. Benj. F. Hegler, Clerk Supreme Court. By Jessie Pardoe, Deputy.

1 In the Supreme Court of the Territory of Oklahoma.

No. 1727.

JOHN R. GREENAMEYER, Plaintiff in Error,
vs.
ISAAC C. COATE, Defendant in Error.

To the Honorable John H. Burford, Chief Justice of the Supreme Court of the Territory of Oklahoma:

Petition For Appeal.

Comes now John R. Greenameyer, who feeling himself aggrieved by Judgment of the Honorable Supreme Court of said Territory en-

tered into the above entitled action on February 13th, A. D. 1907, wherein and whereby it was adjudged by said Supreme Court that the Judgment of the District Court of Kay County, in a certain action wherein John R. Greenameyer was plaintiff and Isaac C. Coate was defendant, and the same was upheld and affirmed to the injury of this petitioner.

And your petitioner doth hereby appeal from said judgment in said action and prays an appeal as by law provided. And doth pray that this his petition for said appeal be allowed and granted and that such proper orders may be made to the end and that a true and correct transcript of the record, proceedings, papers, documents and exhibits upon which and by reason of which said judgment and orders were made, duly attested and authenticated, may be transmitted as by law provided, to the Supreme Court of the United States of America sitting at Washington, District of Columbia. Assignment of Errors accompanying this petition.

JOHN R. GREENAMEYER, *Plaintiff.*
By WILLIAM KIETH AND
KOS & V. HARRIS, *His Attorneys.*

Dated April 16, 1907.

2 Endorsed: No. 1727 John R. Greenameyer, plaintiff in error, *vs.* Isaac C. Coate, defendant in error. Petition for Appeal. Filed April 24, 1907. Benj. F. Hegler, Clerk Supreme Court, by Jessie Pardoe, Deputy.

3 In the Supreme Court of the Territory of Oklahoma.

No. —.

JOHN R. GREENAMEYER, Plaintiff in Error,
vs.
ISAAC C. COATE, Defendant in Error.

Assignment of Errors.

And now comes the plaintiff above named and files herewith his petition for a writ of error in the above entitled matter and alleges and avers that there are errors in the record and proceedings in the above entitled cause, and for the purpose of having the same reviewed in the Supreme Court of the United States of America, the plaintiff makes the following assignments of error, to wit:

First.

That the Supreme Court of the Territory of Oklahoma erred in affirming the ruling of the District Court of Kay County, Oklahoma, sustaining the demurrer of the defendant to the second amended petition of the plaintiff, filed in the said cause on September 5th, A. D., 1904.

Second.

That said Supreme Court erred in affirming the judgment of the District Court of Kay County, Oklahoma, in the above entitled action.

Third.

That said Supreme Court erred in holding that the plaintiff's second amended petition in said cause did not state a cause of action in favor of the plaintiff and against the said defendant.

4 Fourth.

That said Supreme Court erred in holding and deciding that the Secretary of the Interior of the United States of America did not misapply the law to the facts as found by the various contest proceedings between the said parties all as set out in the exhibits annexed to the second amended petition in said cause.

Fifth.

That said Supreme Court erred in holding and deciding that the plaintiff did not show and disclose and sufficiently allege that fraud had been practiced and committed by the said defendant, Coate, at and in the trial of the contest case, as set forth by said plaintiff in the second amended petition, which said fraud practiced and committed by the said defendant, no reasonable diligence on the part of said plaintiff could have avoided.

Sixth.

Said Supreme Court erred in holding that, admitting all of the facts set forth in said second amended petition, there was no question of law presented in and by said second amended petition, upon which a judgment might be entered in favor of the said plaintiff and against the said defendant, adjudging that the said defendant's title to said land was held in trust for the said plaintiff's use and benefit.

Seventh.

That said Supreme Court erred in holding and deciding that the district court of Kay County, Oklahoma, had no jurisdiction of the subject matter of the plaintiff's second amended petition.

For which errors, above set forth, the said plaintiff, John R. Greenameyer, prays that the said judgment of the Supreme Court of the Territory of Oklahoma, dated the 13th day of February, A.
5 D., 1907, be reversed by the Supreme Court of the United States and that such judgment be rendered in favor of the said plaintiff as the merits of the said cause require.

WILLIAM KIETH AND
KOS & V. HARRIS,
Attorneys for John R. Greenameyer.

Endorsed: No. 1727. The Supreme Court of Oklahoma. John R. Greenameyer *vs.* Isaac C. Coate. Assignment of errors. Filed April 24, 1907. Benj. F. Hegler, Clerk Supreme Court, by Jessie Pardoe, Deputy.

6 STATE OF KANSAS, *Sedgwick County, ss:*

Before me the undersigned, a Notary Public within and for the County and State aforesaid, personally appeared John R. Greenameyer, who being duly sworn upon his oath, deposes and says:

That whereas he is about to take an appeal from the judgment rendered against him in the Supreme Court of the Territory of Oklahoma, wherein John R. Greenameyer is plaintiff, and Isaac C. Coate, is Defendant, and whereas the subject matter of the controversy is the title to the following described real estate, situate in the County of Kay in the Territory of Oklahoma, to wit: Lots 1 & 2 and East half of north west quarter of section 18, Township 26, Range 2 E. in Kay County, Oklahoma.

And said Greenameyer being sworn, deposes and says that the value of the said land and the value of the subject matter of the controversy in the above entitled action is the sum of Eight Thousand Dollars.

Further affiant saith not.

JOHN R. GREENAMEYER.

Subscribed in my presence and sworn to before me by John R. Greenameyer, this 20th day of April, 1907.

J. M. HARRIS,
Notary Public.

[SEAL.]

My commission expires August 25, 1907.

Endorsed: No. 1727. John R. Greenameyer, plaintiff in error, *vs.* Isaac C. Coate, defendant in error. Affidavit as to Amount Involved. Filed April 24, 1907. Benj. F. Hegler, Clerk Supreme Court, by Jessie Pardoe, Deputy.

7 No. 1727.

In the Supreme Court of the Territory of Oklahoma.

JOHN R. GREENAMEYER, Plaintiff in Error,
vs.
ISAAC C. COATE, Defendant in Error.

—— Term, A. D. 1907.

Proceeding in the Above Action —— A. D. 1907, in Open Court, at Guthrie.

In the Matter of the Appeal of JOHN R. GREENAMEYER.

Order Allowing Appeal.

And now at the date and term aforesaid, comes the above named plaintiff and presents his petition for an appeal in the above matter, and it is ordered that an appeal to the Supreme Court of the United

States of America, be and the same is hereby allowed on the judgment entered in this action by the Supreme Court of Oklahoma, on the 13th day of February, A. D. 1907.

And it is ordered that a transcript of the record in said cause and all proceedings therein be transmitted to said Supreme Court of the United States.

It *if* further ordered that said appeal be allowed on giving bond in the sum of Five Hundred Dollars, to be approved by the Chief Justice of this Court. Said bond to act as stay pending said appeal.

JNO. H. BURFORD,
Chief Justice Supreme Court of Okla.

Attest:

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

[SEAL.]

Endorsed: No. 1727. John R. Greenameyer, plaintiff in error, *vs.* Isaac C. Coate, defendant in error. Order allowing appeal. Filed April 24, 1907. Benj. F. Hegler, Clerk Supreme Court, by Jessie Pardoe, Deputy.

8 In the Supreme Court of the Territory of Oklahoma.

No. —.

JOHN R. GREENAMEYER, Plaintiff in Error,
vs.
ISAAC C. COATE, Defendant in Error.

Bond.

Know all men by these presents: That we, John R. Greenameyer, as principal, and V. H. Branch of Wichita, Kansas and Guy Greenameyer of Wichita Kansas, as sureties, are held and firmly bound unto Isaac C. Coate, defendant in error; in the sum of Five Hundred Dollars, which sum is to be truly paid to the said defendant, to which payment, well and truly to be made, said principal and sureties bind themselves jointly and severally and firmly by these presents. Dated this 16 day of April, A. D. 1907.

Whereas the above named plaintiff in error, John R. Greenameyer, seeks to prosecute his appeal to the Supreme Court of the United States of America to reverse the judgment rendered in the above-entitled action against him by the Supreme Court of the Territory of Oklahoma.

Now therefore, The condition of this obligation is such that if the said above named, John R. Greenameyer, shall prosecute his said appeal to effect and answer all costs and damages that may be

adjudged, if he fail to make good his appeal, then this obligation to be void; otherwise the same to be in full force and effect.

JOHN R. GREENAMEYER,
Principal.

V. H. BRANCH,
GUY GREENAMEYER,
Sureties.

Attest:

——— ———.

9 *Oath of Sureties.*

V. H. Branch and Guy Greenameyer, each being duly sworn upon oath, depose and say that they are each of lawful age and are citizens of Sedgwick County, State of Kansas, and are acquainted with the contents of the foregoing instrument, to which they have signed their names and they each say they are worth the sum of Five Hundred Dollars, over and above all debts, liabilities and exemptions.

V. H. BRANCH,
GUY GREENAMEYER,
Sureties.

Subscribed in my presence and sworn to before me, this 16 day of April, 1907, by the above named sureties.

In witness whereof, I have hereunto set my hand and affixed my Notarial seal the date last above written.

[SEAL.] E. M. DILL,
Notary Public.

My commission expires April 15th, 1909.

The above bond approved and the same to operate as supersedeas in the above entitled cause.

JNO. H. BURFORD,
Chief Justice and Presiding Judge of the Supreme Court of the Territory of Oklahoma.

Endorsed: No. 1727. In the Supreme Court of the Territory of Oklahoma. John R. Greenameyer, plaintiff in error, *vs.* Isaac C. Coate, defendant in error. Appeal bond. William Kieth, Wichita Kansas, and Kos Harris Attorneys for Plaintiff in Error. Filed April 24, 1907, Benj. F. Hegler, Clerk Supreme Court, by Jessie Pardoe, Deputy.

10 In the Supreme Court of the Territory of Oklahoma.

JOHN R. GREENAMEYER, Plaintiff in Error,
vs.
ISAAC C. COATE, Defendant in Error.

Petition in Error.

The above named John R. Greenameyer, plaintiff in error, complains of the above named defendant in error, Isaac C. Coate, for

that the said Isaac C. Coate, at the September, 1904, term of the District Court of Kay County, Territory of Oklahoma, recovered a judgment, by the consideration of said court, against the said John R. Greenameyer in a certain action then pending in the said court, wherein the said John R. Greenameyer was plaintiff, and the said Isaac C. Coate was defendant. The original case-made, duly certified and attested, is hereunto attached, marked "Exhibit A" and made a part of this petition in error; and the said John R. Greenameyer avers that there is error in said record and proceedings in this, to wit:

1st. Said court erred in finding that it is not shown in plaintiff's second amended petition wherein the Honorable Secretary of the Interior misapplied the law to the undisputed facts as established in the various contest proceedings.

2nd. The trial court erred in finding that it is not shown by plaintiff's second amended petition that fraud and imposition was practiced on the plaintiff below in the contest proceedings in the Land Department whereby said plaintiff was prevented from exhibiting his case fully to the said Land Department.

3rd. The trial court erred in finding that it had no jurisdiction of the subject matter contained in said amended petition, for the reason that said second amended petition shows that the land tribunal has passed upon all the matters and facts alleged in said second amended petition.

4th. The trial court erred in holding that said second amended petition does not state a cause of action because it does not contain the evidence adduced on the trial of the contest case in the land tribunal.

5th. The trial court erred in holding that the plaintiff's said second amended petition does not state facts sufficient to constitute a cause of action in favor of the plaintiff below and against said defendant, or to entitle the plaintiff to the relief prayed for.

6th. The trial court erred in sustaining the demurrer to plaintiff's second amended petition and in rendering a judgment dismissing said action at the cost of plaintiff.

Wherefore the plaintiff in error prays, that said judgment so rendered may be, reversed, set aside and held for naught, and that the plaintiff in error be restored to all rights he has lost by the rendition of such judgment, and for such further relief as to the court may seem just.

JOHN R. GREENAMEYER,
Plaintiff in Error,

By KEITH & WRIGHT AND
C. W. RANSOM,
His Attorneys.

Filed May 1, 1905.

BENJ. F. HEGLER,
Clerk Supreme Court.

12 In the District Court of the Territory of Oklahoma in and for Kay County, Sitting with the Powers of a District Court of the United States within and for said County and Territory.

JOHN R. GREENAMEYER, Plaintiff,
vs.
ISAAC C. COATE, Defendant.

TERRITORY OF OKLAHOMA, *Kay County, ss:*

Case-made.

Be it remembered, that heretofore, to wit, on the 20th day of June, 1903, the above named plaintiff filed his petition in the office of the Clerk of the above named District Court at Newkirk, Oklahoma. A copy of said petition is in the words and figures following, to wit:

13 In the District Court in and for Kay County, Oklahoma Territory.

JOHN R. GREENAMEYER, Plaintiff,
vs.
ISAAC C. COATE, Defendant.

Petition.

The above named plaintiff, John R. Greenameyer, for his cause of action against the above named defendant, Isaac C. Coate, respectfully shows the court the following:

That said Isaac C. Coate holds the legal title of all the tract of land lying and being in Kay County, Oklahoma Territory, owned and described as lots 1 and 2 and east half of northwest one quarter of Section 18, township 26, of Range 2 east of the Indian Meridian, under a certain patent of the United States.

That this plaintiff is in equity the rightful owner of said above described tract, and is entitled to have the legal title of said tract vested in him by decree of the court by reason of the following facts;

That heretofore, to wit, on the 19th day of September, 1893, the plaintiff, John R. Greenameyer, filed his Soldier's Declaratory Statement, No. 53, for said above described tract of land at a time when it was a portion of the public domain of the United States and open to appropriation under the homestead and settlement laws; that said John R. Greenameyer was fully qualified under said laws to file said Soldier's Declaratory Statement, make entry for said tract of land, and receive title thereto; that the said John R. Greenameyer visited said tract of land in the early morning of September 20th, 1893 and found no one encamped on said tract; that on November

2nd, 1893 said plaintiff again visited said land and seeing the de-
defendant, Isaac C. Coate, there, warned said defendant of his
14 (plaintiff's) claim and rights to said tract of land; that said
plaintiff visited and fenced said tract of land on or about the 10th day of December, 1893; that on March 9, 1894, said plaintiff transmuted his said Soldier's Declaratory Statement to Homestead Entry 5588, moved a house upon the land and established actual residence thereon; that said plaintiff's wife joined him there on March 15, 1894, remaining 3 days, during which time said plaintiff began the erection of an addition to his said house; that said plaintiff soon after returned to Kansas for the balance of their household goods and effects, returning with them in 30 days' time, and thereupon continued to reside upon said tract of land for more than 5 years, and otherwise fully complied with the requirements of the homestead law, and earned the right to receive a patent therefor, and thereupon did and performed each and every act necessary and requisite to procure the issuance of such patent.

That subsequent to the filing of said plaintiff's Soldier's Declaratory Statement and the settlement of said John R. Greenameyer, a contest was had in the Land Department of the United States between said John R. Greenameyer and said defendant, Isaac C. Coate, in which said contest decisions were had before each of the branches of said department, and that by the final decision therein had before the Secretary of the Interior, it was found and held that the said Coate had the prior and superior right to said tract of land.

That the said contest case was prosecuted by said plaintiff, John R. Greenameyer, to a final adjudication, and each and every remedy afforded by said department was exhausted to reverse said decisions, and all without avail.

That said decision awarding said tract of land to said defendant was contrary to law, in that said Secretary of the Interior misapplied the law, in holding that the facts proven and found as to
said defendant's settlement upon said tract of land gave him
15 the status of a settler upon said tract prior to the time that
said plaintiff filed his said Soldier's Declaratory Statement, as there found, upon the said tract.

That said decision is therefore wrongful, erroneous and unlawful, and said defendant's title to said tract of land, under it, is held in trust for this plaintiff, and should so be decreed.

That said decision awarding said tract to said defendant was erroneous and unlawful, by reason of the fact that said defendant procured and received same by fraud, in that he did wrongfully and fraudulently testify that said defendant, Isaac C. Coate, was upon said tract of land claiming the same prior to the date of the filing of plaintiff's said Soldier's Declaratory Statement, to wit, the 19th day of September, 1893; that said false and fraudulent testimony was the basis upon which said decision awarding said tract to said defendant was based; that plaintiff was unable to produce adequate and sufficient evidence to establish said fraud before the Land Department; that he has now discovered the proofs of said fraud, since said contest closed; that he could not, with reasonable

diligence, have produced the same before the Land Department in said contest proceeding.

That in like manner said defendant did falsely and fraudulently testify, and produced other witnesses who falsely and fraudulently testified that he (the said defendant) did reside upon said tract from the 16th day of September, 1893, to the 20th day of September, 1893, and by means of such testimony said defendant secured the decision of said department in said final contest upon said false evidence, to the effect that the defendant did so reside upon said tract, when in truth and in fact he did not so reside thereon, and this plaintiff was the only person claiming said tract who fulfilled the requirements of the law.

16 That the final proofs and patent of defendant was made and received in fraud of the rights of this plaintiff, upon such false and fraudulent testimony, and the decision of the department thereon had: that were it not for such false testimony and fraud on the part of the defendant, said tract and the patent therefor would now be vested in this plaintiff.

Wherefore plaintiff prays that a decree be entered in plaintiff's behalf to the effect that he is the rightful owner to said tract; that defendant has wrongfully and fraudulently deprived him of the legal title thereof, and that said defendant's said title under said patent be held in trust for this plaintiff; that it be further decreed that title of said tract be vested in said plaintiff. Plaintiff prays for all other and additional relief that may be just and proper in the premises, and asks that an injunction forthwith issue enjoining and restraining said defendant Coate from selling or disposing of any part of said tract during the pendency of this case.

MATSON, KEITH & MATSON AND
C. W. RANSOM,
Att'ys for Plaintiff.

17 **In the District Court of Kay County, Oklahoma Territory.**

JOHN R. GREENAMEYER, Plaintiff,
vs.
ISAAC C. COATE, Defendant.

STATE OF KANSAS, *County of Sedgwick, ss:*

John R. Greenameyer, being duly sworn deposes and says that he is the plaintiff in the above entitled action; that he has read the foregoing petition and knows the contents thereof; and that the facts stated therein are true to the knowledge of deponent.

JOHN R. GREENAMEYER.

Subscribed and sworn to by John R. Greenameyer before me this 19 day of June, 1903.

MONROE E. WRIGHT,
Notary Public.

My commission expires on the 10th day of July, 1906.

Endorsements: No. 2314, Territory of Oklahoma, District Court, County of Kay. John R. Greenameyer, plaintiff, *vs.* Isaac C. Coate, defendant. Petition. Matson, Keith & Matson, 407, 8 and 9 Winne Bldg., Wichita, Kansas, and C. W. Ransom, Perry, O. T., attorneys for plaintiff. Filed June 20, 1903. Jay E. Pickard, Clerk, by E. A. Burke, Deputy.

18 That afterwards and on the 20th day of June, 1903, said plaintiff filed his precipe for summons which reads in the words and figures following, to wit:

District Court of Kay County, Oklahoma Territory.

No. —.

JOHN R. GREENAMEYER
vs.
ISAAC C. COATE.

To the Clerk of said Court:

Issue summons in the above entitled cause, returnable according to law, and direct the same to the Sheriff of Kay County, Territory of Oklahoma, to or for the defendant, Isaac C. Coate.

Action brought for ——.

Dated this 19th day of June, A. D., 1903.

MATSON, KEITH & MATSON AND
C. W. RANSOM,
Attorney- for Plaintiff.

Endorsed: # 2314. District Court, Kay County, O. T. Precipe for summons. John R. Greenameyer, pl'ff, *vs.* Isaac C. Coate, def't. Matson, Keith & Matson, and C. W. Ransom, attorneys. Filed June 20, 1903. Jay E. Pickard, Clerk, by E. A. Burke, Deputy.

19 And thereupon on the said 20th day of June, 1903, the Clerk of said court issued its summons to the above named defendant, which summons and the Sheriff's returns thereon reads in the words and figures following, to wit:

20 *Summons.*

In the District Court of Kay County, Oklahoma Territory, Fourth Judicial District.

UNITED STATES OF AMERICA,
Territory of Oklahoma, Kay County, ss:

The Territory of Oklahoma to the Sheriff of Kay County, in said Territory, Greeting:

You are hereby commanded to notify Isaac C. Coate that he has been sued by John R. Greenameyer in the District Court sitting in

and for said County of Kay and that unless he answer by the 20th day of July A. D. 1903, the petition of the said John R. Greenameyer against him filed in the Clerk's office of said Court, such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 30th day of June, A. D. 1903.

Witness my hand and seal of said court, affixed at my office in Newkirk this 20th day of June, A. D. 1903.

JAY E. PICKARD, *Clerk,*
By E. A. BURKE,
Deputy Clerk.

Endorsed.

TERRITORY OF OKLAHOMA, *Kay County, ss:*

Received this writ June 20th, 1903, and as commanded therein, I summoned the following persons of the defendants within named at the time following, to wit:

Isaac C. Coate, June 20th, 1903, by delivering to him, said defendants, personally, in said county a true and certified copy of the within summons, with all the endorsements thereon.

The following persons of the defendants within named not found in said county:

21 *Sheriff's Fees.*

Service and return first person	$.50
Serving—additional persons	
One cop-	.25
Mileage 30 miles	3.00
Not found	
Total	$3.75

DAN A. BAIN, *Sheriff.*

Further endorsed: Summons. # 2314. Ap. Doc. 5, Page 263. District Court Kay County Oklahoma Territory. John R. Greenameyer, *vs.* Isaac C. Coate. Issued June 20, 1903. Returnable June 30, 1903. Ans. Due July 20, 1903. Filed June 23, 1903. Jay E. Pickard, Clerk. Attorney for pl'ff. By E. A. Burke, Deputy.

I hereby certify the within to be a true copy of the original summons with all the endorsements thereon.

——— ———, *Sheriff.*
——— ———,
Under Sheriff.
——— ———, *Deputy.*

22 And thereafter and on the 30th day of June, 1903, defendant, Isaac C. Coate, filed his demurrer to plaintiff's petition in said case, in the words and figures following, to wit:

In the District Court of Kay County, Oklahoma Territory.

Case # 2314.

JOHN R. GREENAMEYER, Plaintiff,
vs.
ISAAC C. COATE, Defendant.

Demurrer.

Now comes the above named defendant, and demurs to the petition of the plaintiff filed herein, for the reason that said petition does not contain facts sufficient to constitute a cause of action against the defendant, and in favor of the plaintiff.

C. L. PINKHAM AND
CLINE & DUVAL,
Attorneys for Defendant.

Endorsed: Case #2314. John R. Greenameyer, plaintiff *vs.* Isaac C. Coate, Defendant. Demurrer. Filed June 30, 1903, Jay E. Pickard, Clerk by E. A. Burke, Deputy.

23 And thereafter and on the 29th day of September, 1903, and on the 6th day of October, 1903, the following proceedings were had in said case, a copy of the journal entry of which is in the words and figures following, to wit:

In the District Court of Kay County, Oklahoma Territory.

No. 2314.

JOHN R. GREENAMEYER, Plaintiff,
vs.
ISAAC C. COATE, Defendant.

Now on this 29th day of September, 1903, this cause comes on for hearing on the demurrer of the defendant to the petition of the plaintiff. The plaintiff appears by C. W. Ransom and Matson, Keith and Matson, his attorneys, and the defendant appears by Cline & Duval and C. L. Pinkham, his attorneys.

The court, having heard said demurrer and the argument of counsel, upon consideration, being fully advised in the premises, finds that said demurrer should be sustained.

It is therefore by the court considered, ordered and adjudged that said demurrer to plaintiff's petition herein be and the same is hereby sustained. To which ruling of the court the said plaintiff duly excepted and excepts.

Thereupon the plaintiff asks and is by the court granted leave to file an amended petition herein within ten days from this date.

24 In the District Court of Kay County, Oklahoma Territory.

No. 2314.

JOHN R. GREENAMEYER, Plaintiff,
vs.
ISAAC C. COATE, Defendant.

Now on this 6th day of October, 1903, upon application of the plaintiff, for good cause shown, the said plaintiff is by the court granted thirty days in addition to the time heretofore given, in which to file an amended petition herein, and the defendant is granted twenty days thereafter in which to plead to such amended petition.

And thereafter, and on the 10th day of November, 1903, the said plaintiff filed his amended petition in the above entitled case, which reads in the words and figures following, to wit:

25 In the District Court of the Territory of Oklahoma in and for Kay County, Sitting with the Powers of a District Court of the United States Within and for said County and Territory.

JOHN R. GREENAMEYER, Plaintiff,
vs.
ISAAC C. COATE, Defendant.

Amended Petition.

Now comes the plaintiff, John R. Greenameyer, and files this his amended petition herein, and for his cause of action against the above named defendant, Isaac C. Coate, alleges and shows to the court, as follows:

That pursuant to the act of Congress approved March 3rd, 1893, and the Proclamation of the President of the United States, thereinunder issued, and dated August 9, 1893, that portion of the Territory of Oklahoma known as the Cherokee Outlet, was opened to settlement under the terms of the settlement and homestead laws of the United States, to wit: on the Sixteenth day of September, 1893, at Twelve o'clock noon, Central Standard time of that day; that this plaintiff was then a native born citizen of the United States, and the head of a family and over the age of Twenty one years and had theretofore served as a duly enlisted soldier in the Army of the United States during the war of the rebellion for a period of more than two years, and was honorably discharged from said army and service on September 13, 1865, that he had never prior to that date next hereinafter mentioned, made any entry under the homestead laws of the United States or filed any Soldier's Declaratory Statement for any of the public lands of the United States, and was not at

said date, or at any time since, the owner of one Hundred and Sixty acres of land in any Territory or State of the United States,
26 and was on said date and at all time- since in all other respects fully qualified to make and enter, a Soldier's Declaratory Statement and Homestead Entry for the tract of land next hereinafter described; that plaintiff had not in any manner violated the said Act of Congress or the Proclamation of the President opening said lands to settlement as aforesaid, by entering upon or occupying any part thereof prior to 12 o'clock noon, central standard time on September 16, 1893; that on September 14, 1893, plaintiff duly procured from one of the Booths established under the terms of said proclamation a Certificate in due form, entitling this plaintiff to file a Soldier's Declaratory —, and perfect a homestead entry for a Quarter Section of the lands so opened to settlement as aforesaid.

That being in all respects duly qualified as aforesaid this plaintiff on the 19th day of September 1893, at the United States land office at Perry, being the Land Office of the Land District in which the tract next hereinafter mentioned was then situated, filed in due form his application for a Soldier's Declaratory Statement for all of that Tract of Land, being a portion of the lands opened to settlement as aforesaid, known and described as Lots one and two, and east one half of the northwest quarter of section Eighteen of township twenty six north of Range Two east of the Indian Meridian the same being now situated in Kay County, Territory of Oklahoma, the same then being a part of the public domain and vacant and subject to entry at said Land office, and said application so filed as aforesaid, was thereupon received by the Register of said Land office, and plaintiff there and then paid the fees and commissions upon said application as fixed by law to the Receiver of said Land Office, and thereupon said Soldier's Declaratory Statement was by said officers entered and filed upon the records of said office as Soldier's
27 Declaratory Statement number 53; that said tract at the time of filing said Declaratory Statement was vacant and unoccupied by any legal settler, and the same was then subject to appropriation by such filing and Declaratory Statement under the Homestead laws of the United States. That thereafter and within due time and to wit: on the Eighth day of March, 1894, plaintiff again appeared before said land Office and then and there transmuted his said Soldier's Declaratory Statement by making upon application and fees and commission then and there in due form filed and paid Homestead Entry 5588, and upon the same date plaintiff moved a house upon said tract and took up his residence upon said tract, and there duly continued to live and reside with his family for seven years next following the date last above named, and during said period each year plaintiff cultivated forty acres of said tract and cropped the same, and for each of said season- plaintiff grazed forty acres of said tract in addition to the lands cultivated as aforesaid, and likewise placed upon said tract a good dwelling house, a barn, cow-shed, wagon-shed, hog pens, dug-out, and fenced 80 acres of said tract with post and wire fence around said eighty acres and a cross-fence separating the same into forty acre lots, said

improvements being of the value of Four Hundred and Fifty dollars. That after residing upon said tract and cultivating the same in the manner aforesaid plaintiff made application in due form at said United States Land Office and did submit and make Final proof in due form for said tract upon his said homestead entry, and offered to pay the fees and commissions thereon which said offer was rejected, and not received by the Register and Receiver of said office. That plaintiff has done each and every other act requisite and necessary to obtain patent to said tract as required by the Homestead and other laws of the United States in such case made and provided.

28 That on November 24, 1893, the defendant Isaac C. Coate appeared before said Land office and then and there made Homestead Entry for said above described tract, which said entry was then and there allowed and expressly made as subject to the aforesaid Soldier's Declaratory Statement of this plaintiff; and which entry was by law excluded and cancelled by the aforesaid act of this plaintiff, in transmitting said Declaratory Statement into said Homestead entry No. 5588 on the 8th day of March, 1894; That after his said entry was as aforesaid excluded from the records of the Land department, and to wit, on the 28th day of March, 1894, the defendant filed in said Land Office an application to contest the entry of this plaintiff for said tract, which said contest charged that said defendant was the prior settler upon said tract and asked a hearing upon said question; that thereafter a hearing was had upon said contest and charge between these parties at the United States Land office at Perry, Oklahoma Territory, and decision was thereupon duly had in said cause, and a copy of said decision is hereunto attached and marked Exhibit "A" and hereby made a portion of this petition;

That subsequently said contest cause was duly appealed and upon said appeal came on to be considered in due course before the Commissioner of the General Land Office, and was by said officer duly considered and determined by decision of date July 25, 1896, a copy of which said decision and judgment is hereunto attached and marked Exhibit "B" and is hereby made a part of this petition.

That subsequently said contest cause was duly appealed from said decision of the Comissioner of the General Land Office and upon said appeal came on to be considered in due course by and before the Secretary of the Interior, and was by him thereupon duly

29 considered and the issues therein adjudged and decided, by decision and Judgment of the Secretary of the Interior of date June 21, 1898, a copy of which said decision is hereto attached and marked Exhibit "C" and hereby made a part of this petition, which said decision expressly found that the acts of settlement performed by defendant Coate upon this tract prior to the filing of plaintiff's Declaratory statement as aforesaid, as by him given and stated, did not in law constitute him a *bona fide* settler upon this tract; that said acts were wholly insufficient under the law to segregate said tract and appropriate the same to the use of the said Coate; that the said Coate performed no sufficient act or acts upon said tract to constitute settlement until long after plaintiff filed his Soldier's

Declaratory Statement as aforesaid; and that the rights of this plaintiff in and to the said tract were both prior and superior to any rights of defendant therein.

Subsequently the defendant filed in due time and form his motion for review of said decision of the Secretary of the Interior which said motion came on to be considered in due course, and was by the Secretary of the Interior denied by decision and judgment of date of October 5th, 1898, a copy of which said decision is hereto attached and made a part of this petition, and marked Exhibit "D", in which said decision he in all things re-affirmed his aforesaid findings and conclusions and finally dismissed the contest of defendant, cancelled his entry and closed case and awarded the right of entry-ng said tract to this plaintiff.

That subsequently said Coate filed a petition for review of said decision, and for rehearing in said cause addressed to the supervisory power and authority of the Secretary of the Interior, which said petitions were entertained, and on February 7, 1899, a rehearing was ordered in said cause, and the same was remanded to the
30 local land office for further hearing upon questions of fact, and said petition for re-review was denied.

That thereupon said cause was again set for trial and duly heard in said local land office, and decision was therein duly rendered by the Register and Receiver of said Land Office on August 31, 1899, a copy of which said decision is hereto attached and made a part of this petition and marked Exhibit "E".

That thereupon said cause was duly appealed and came duly on for consideration upon said appeal before the Commissioner of the General Land Office, and decision was thereupon rendered on January 15, 1900, a copy of which is hereunto attached and marked Exhibit "F" and made a part of this petition.

That thereupon said cause was duly appealed to the Secretary of the Interior from said last named decision, and the same was considered by the Secretary of the Interior, and upon the 3rd day of July 1900, decision was thereupon rendered and entered; a copy of which said decision is hereunto attached and marked Exhibit "G" and hereby made a part of this petition.

That thereupon this plaintiff duly filed his motion for review of said last mentioned decision, and said motion came on for consideration in due course and was by the Secretary of the Interior denied, and said cause was thereupon closed, and the entry of this plaintiff was cancelled and his claim for said tract was held for naught, a copy of which said decision is hereto attached and marked Exhibit "H" and hereby made a part of this petition; and thereupon said cause was finally closed, and the entry of said Isaac C. Coate was reinstated and his rights in and to said tract were held to be both prior and superior to those of this plaintiff. That said cause has since said date remained closed in the Land Department.

That subsequently the said Isaac C. Coate submitted final proof and prior to the commencement of this action secured patent from the United States for said above described tract and now
31 holds the legal title to said tract thereunder.

That plaintiff is in equity the rightful owner of said above

described tract and is entitled to have the legal title of said tract vested in him by decree of the court by reason of the facts above set out as to his claim to said tract and compliance with all of the requirements of the homestead laws as aforesaid, and by reason of mis-application of law on the part of the Land Department in said contest cause in the decisions above set out and marked Exhibits "—" and "—" and "—" and that by the proper application of the law to the facts as proven in said cause and found by the said decisions, the claim of this plaintiff to said tract should have been finally held prior and superior to the claim of said defendant, and patent conveying title to said tract should and would have been made and delivered to this plaintiff; That said misapplication of law of which plaintiff now complains was in the respects and particulars as follows, to wit:

That the Department held in said Decision of July 3, 1900, that the acts of Coate in setting a stake upon this land, and digging a small hole not more than a spade or two deep and a couple — feet across, said acts being all of the visible improvements placed by him, under the facts as found, upon said tract prior to the date and time of the filing of plaintiff's Declaratory Statement as aforesaid, did as a matter of law amount to and constitute such acts of substantial and permanent character as to appropriate the land and initiate a valid right of settlement thereto, from the date and time of said staking; that said acts were sufficient to initiate and preserve such prior settlement rights in and to this tract, notwithstanding the further fact as found, that said Coate before performing any other or different act upon said tract left said tract and returned to his home in the state of Kansas, and there remained
32 for the period of over a month after said Declaratory Statement was placed of record.

That upon precisely the same state of facts the Department held in said decision of June 21, 1898, as follows:

"After a thorough examination of the testimony, the Department is of the opinion that the acts of Coate, were insufficient to hold the land against the Soldier's Declaratory filing of Greenameyer.

If it should be conceded that everything claimed to have been done by Coate in the way of Settlement, were true, his said acts, would not, in the judgment of this Department, constitute him a *bona fide* settler prior to the 19th day of September, 1893, when the defendant made his declaratory statement of record.

Coate reached the land between One and Two o'clock on the afternoon of the opening, and remained on or adjacent to the claim until the 20th, four days. All that he did in these four days was to stick his flag and dig a hole which he calls a starting of a well, two feet deep and two and a half or three feet across. He then left and went back to his home in Kansas, 150 miles distant. The digging of this hole would not require more than an Hour's labor by one man. This was all he did between the 16th and 20th, while he remained on or near the claim prior to his return to Kansas. The rest of this time he spent, "watching people off" of the claim and in going to Newkirk on the 19th to "file by mail". He did not return

to the claim after leaving on the 20th of September until the 22nd of October, and his return at that time was due to the fact that he received a letter from one White, stating a soldier had filed on the land."

That the first of these aforesaid diverse ruling- and holdings of the Department upon the same state of facts is a misapplication of law; that the true rule and application of law to said facts is as set out in the quotation last above set forth, and under such
33 correct application of law to said facts, it must follow that Coate initiated no valid claim to this tract of land prior to the filing of plaintiff's aforesaid Declaratory Statement; that the final judgment of the Department cancelling the entry of this plaintiff and confirming the right and claim and entry of said Coate was based solely upon said erroneous application of the law to said facts.

Plaintiff further assigns error and misapplication of law in said decisions in the respects following, to wit:

That said decision of date June 21, 1898, and October 5th, 1898, were rendered by C. N. Bliss, then the duly acting and appointed and qualified Secretary of the Interior; that said decision of date July 3, 1900, was rendered by a successor of said C. N. Bliss in said office of Secretary of the Interior, to wit, E. A. Hitchcock. That the decisions so made as aforesaid by the said C. N. Bliss, were had and rendered upon the same state of facts, as to the initial acts of settlement performed by Coate upon this tract as that upon which said decision rendered by said E. A. Hitchcock was rendered. That the decision of said E. A. Hitchcock, the successor in office of said Bliss, was had upon the same issues of law in the matter of the sufficiency of said Coate's said initial acts, as were theretofore considered and determined by his said predecessor in office, and said later decision is in fact and effect a mere reversal by the said E. A. Hitchcock, Secretary of the Interior, of the decision and opinion and judgment of his predecessor in office. That E. A. Hitchcock, as the sucessor in said office of said C. N. Bliss, as the Secretary of the Interior was without power, authority, or jurisdiction to reverse the final decision aforesaid of his said predecessor in said office. That the said decision of July 3rd, 1900, reversing as aforesaid said decisions of June 21, 1898, and October 5th, 1898,
34 was therefore, without legal force or effect,—that the rule of law applicable to said question of the sufficiency of Coate's said flag and small excavation governing in the Land Department, when the law is correctly applied as to the powers of said E. A. Hitchcock, in said premises, is as laid down by his said predecessor in office. That it was a misapplication of law on the part of the department to cancel the entry of this plaintiff for said tract, and reinstate that of defendant for said tract. That if the law aforesaid had been correctly applied by the department, the entry of this plaintiff for said tract would have been confirmed, his application for final proof granted and patent and title delivered and conveyed to him for the tract in question.

Second Cause of Action.

The plaintiff for a second and separate cause of action here again makes all of the statements hereinbefore set forth in his first cause of action, a part of this his second cause of action, the same as if herein set out at length, and further alleges:

Plaintiff shows to the court that in said contest cause, and in the matter of the filing and making of said homestead entry of the said Isaac C. Coate as above set forth, the defendant prevailed by and through fraud and imposition, both upon the Land Department and upon this plaintiff, which said fraud and imposition was the cause of plaintiff's defeat in said litigation, and the cause of said tract being awarded to defendant by the Land Department; that said fraud was accompanied by deceit, cunning and concealment on the part of the said Coate, whereby he succeeded in concealing his practices and fraudulent acts from this plaintiff, to such extent that plaintiff in said contest was wholly unable to secure the evidence to prove said fraud in said contest case; that the nature of said fraud and imposition was such that defendant could readily conceal the same from plaintiff, and withhold the evidence and proof thereof from the plaintiff and the Land Department, and the plain-
35 tiff exercised all due diligence to discover the evidence and facts concerning said fraud and imposition on the part of said Coate, but was prevented and forestalled in securing the facts, evidence and proof of such fraud by the wrongful conduct of the defendant, and his aforesaid concealment and imposition.

Plaintiff further shows that the nature of said fraud and imposition and its materiality and effect are as follows, to wit:

That under the terms of the homestead laws of the United States certain qualifications are required to be shown and proven by each entry-man of lands under said law; that one of the qualifications so required by law to be shown and proven is and was the fact that the claimant or entryman was not at the date of the initiation of settlement or making of his entry the owner of One Hundred and Sixty acres of land or more in the United States; that under this provision of the homestead law which was in full force and effect at all times since the opening of the Cherokee outlet as above set forth, it became necessary and material for the said Isaac C. Coate to aver and prove as one of such necessary qualifications under the Homestead laws, that he was not the owner of one Hundred and Sixty acres of land or more in the United States at the time of the opening of said outlet to settlement and at the date of his said homestead entry; that the said Isaac C. Coate, prior to said opening, was the owner of a tract of land in the State of Kansas in the year 1893, said tract consisting of over one hundred and Sixty acres and to wit: of one hundred and eighty acres, and he continued to own said tract until the date next hereinafter mentioned; that while so owning said tract said Coate found that it was necessary to dispose of said land in order to make proof of his qualifications as aforesaid to take and enter and hold the tract in question in this action; that to enable him to make said

proof before the Land Department of said qualifications, and
36 while owning said tract of land as aforesaid, and to wit; upon the 27th day of January, 1894, the said Coate did make a certain fraudulent, false and misleading instrument in writing purporting to convey said lands to one, A. C. Midkiff, his son-in-law, which said instrument was as then made in the form as set forth in Exhibit "X" which same is a copy of said instrument and is hereby made a part of this petition.

That said instrument was false and fraudulent and misleading in this, to wit: that while it was in truth made and executed on the 27th day of January, 1894, after defendant's entry and claim to this tract was initiated, said instrument was in fact post-dated and on its face made to appear to have been made, executed and delivered prior to the entry of said Coate and on the 30th day of August, 1893, and by this fraudulent means said Coate caused it to appear that he had sold and conveyed said One Hundred and Eighty acres of land on the 30th day of August, 1893, when in truth and in fact he continued to own the same, and was thereby disqualified from taking and holding any interest in the land involved in this action until the 27th of January, 1894.

That after making and executing said false and fraudulent deed of conveyance, the said Coate, in pursuance of said fraudulent scheme and design and with intent to deceive this plaintiff and the Land Department in said contest cause, with respect to his qualifications to make entry for and hold this tract, did, by and through his said son-in-law, A. C. Midkiff, cause said instrument to be placed on record in the office of the Register of Deeds, of the county in which said tract of 180 acres was located; thereby causing said records of said county to apparently show the fact that said Coate has sold and conveyed said tract prior to the initiation of any claim to this tract on his part; That having thus caused said public record to
37 show such apparent fact of the conveyance of said tract on August 30, 1893, the said Coate did thereafter procure and use and introduce in evidence in said contest cause, with the intent to deceive the Land Department and defraud this plaintiff, a certified copy or statement from said record concerning the date and contents of said deed to establish the aforesaid necessary elements of his qualifications to make homestead entry for and settlement upon the tract involved in this action; and did thereby impose upon the Land Department, and cause its officer to believe and find that said conveyance was made prior to the date of his settlement upon and entry for this tract, and that he (the said Coate) was in said respect not the owner of One Hundred and Sixty acres of land, at the date of his entry and alleged settlement upon this tract, whereas he (the said Coate) was at all time prior to January 27th, 1894, the owner of and in possession of the said tract of land so purported to have been by him conveyed to Midkiff in August, 1893. That by reason of said fraudulent practices, instrument, and certified statement so introduced in evidence by said Coate in said contest as aforesaid, said Coate did cause the Land Department to find that he had conveyed said tract of 180 acres before he initiated claim to the tract involved

in this action, and that he was, therefore, fully qualified to make settlement upon and entry for this tract, and was entitled to take and hold the same as against the adverse claim of this plaintiff, and thereby caused the Land Department by its aforesaid final decision in said contest cause to cancel the entry of this plaintiff and confirm the entry of the defendant for the tract in dispute in this action; that had it not been for said fraudulent acts, practices and impositions and concealment of defendant as above set forth, the fact would have been proven and established that said Coate did own
38 One Hundred and Sixty acres of land and more at the time this plaintiff filed his Declaratory Statement as aforesaid, and at all times thereafter continued to own said lands until the 27th day of January, 1894; which proof would in law have caused the Land Department to find that said Coate was not qualified to make entry for settlement upon this tract in dispute in this action, and caused said Department to have, therefore awarded this tract to this plaintiff, confirmed his entry and cancelled that of said Coate and dismissed his claim and contest for this tract.

That plaintiff has recently discovered the evidence to prove the foregoing charge of fraud, concealment and imposition, and is now able to prove the facts as above set forth.

The plaintiff hereby tenders and offers to pay into court all necessary fees and commissions expended by said defendant in securing his final proof and patent for said tract, and all proper charges in said behalf expended by the defendant.

Wherefore, plaintiff prays that the said defendant be decreed to hold said tract of land in trust for said plaintiff and that defendant be required to convey the legal title to said tract of land to this plaintiff, and that he recover his costs herein paid and that he have all other just and proper relief in the premises.

C. W. RANSOM AND
MATSON, KEITH & MATSON,
Attorneys for Plaintiff.

39 # 19.

TERRITORY OF OKLAHOMA, *County of Kay, ss:*

Personally appeared before me John R. Greenameyer, who being duly sworn on his oath deposes and states that he is the plaintiff above named, that he has read the foregoing petition and knows the contents thereof, and that the statements therein set forth are true as he is informed and verily believes; that all of the statements therein set forth as to plaintiff's rights to said tract by way of filing, entry, residence, cultivation and improvements on his part are true of his personal knowledge.

JOHN R. GREENAMEYER.

Subscribed and sworn to before me this 10th day of November 1903.

JAY E. PICKARD, *Clerk,*
By E. A. BURKE, *Deputy.*

40 And thereafter, and on the 13th day of November, 1903, the defendant, Isaac C. Coate, filed his demurrer to plaintiff's said amended petition in said case, in the words and figures following, to wit:

In the District Court in and for Kay County, Oklahoma Territory.

JOHN R. GREENAMEYER, Plaintiff,
vs.
ISAAC C. COATE, Defendant.

Demurrer.

Comes now the defendant and demurs to the amended petition of the plaintiff, filed herein, for the following reasons, to wit:

First. Because it is not shown in said amended petition wherein the Honorable Secretary has misapplied the law to the undisputed facts as established in the various contest proceedings, in the Land Tribunals.

Second. It is not shown by the plaintiff's amended petition that fraud was practiced on the plaintiff in this cause in the contest proceedings, in the Land Department whereby he was prevented from exhibiting his cause fully to the Land Department.

Third. That the Court has no jurisdiction of the subject matter of the petition filed herein, for the reason that the amended petition shows that the Land Tribunal has passed upon all the matters and facts alleged in said amended petition.

Fourth. That said amended petition does not contain the evidence adduced on the trial of the contest cases in the Land Tribunal.

Fifth. That said amended petition does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant; or to entitle the plaintiff to the relief prayed

41 for.

C. L. PINKHAM, AND
CLINE & DUVAL,
Attorneys for Defendant.

Endorsed: No. 2314. In the District Court of Kay County. John R. Greenameyer *vs.* Isaac C. Coate, Demurrer to Amended Petition Filed Nov. 13, 1903, Jay E. Pickard, Clerk By E. A. Burke, Deputy. C. L. Pinkham and Cline & Duval, Att'ys, for Deft.

And thereafter, and on the 16th day of February, 1904, and the 4th day of June, 1904, the following proceedings were had in said case. A copy of the journal entry of which is in words and figures following, to wit:

42 In the District Court of Kay County, Oklahoma Territory.

Case No. 2314.

JOHN R. GREENAMEYER, Plaintiff,
vs.
ISAAC C. COATE, Defendant.

Now on this 16th day of February, 1904, the above entitled cause is called in its regular order on the docket.

The plaintiff appears by C. W. Ransom and Keith, Matson & Wright, his attorneys, and the defendant appears by C. L. Pinkham and Cline & Duval, his attorneys.

Thereupon the plaintiff asks and is by the court granted leave to amend his petition by attaching thereto an exhibit.

Thereupon this case comes on for hearing upon the demurrer of the defendant to the amended petition of the plaintiff.

Said demurrer is argued by counsel for the respective parties and is by the court taken under advisement and ruling upon the same is reversed at this time.

43 In the District Court of Kay County, Oklahoma Territory.

Case No. 2314.

JOHN R. GREENAMEYER, Plaintiff,
vs.
ISAAC C. COATE, Defendant.

Now on this 4th day of June, A. D. 1904, the same being a judicial day of the regular February term, 1904, of this court, the above entitled cause comes on for further hearing upon the demurrer of the defendant to the amended petition of the plaintiff. The plaintiff appears by C. W. Ransom, his attorney, and the defendant appears by C. L. Pinkham and Cline & Duval, his attorneys.

The Court having heard said demurrer and the argument of counsel, upon consideration, being fully advised in the premises, finds that said demurrer should be sustained

It is therefore by the Court considered, ordered and adjudged that the said demurrer of the defendant to the amended petition of the plaintiff be and the same is hereby sustained, to which ruling, order and judgment of the court the plaintiff at the time duly excepted and excepts, and asked leave of the court to amend his said amended petition.

44 And thereafter, and on the 4th day of June, 1904, the plaintiff filed his written objection and exceptions to the order of the court sustaining said last mentioned demurrer and asking leave to amend plaintiff's said amended petition, which said writing was in the words and figures following, to wit:

District Court, Kay County, O. T.

JNO. R. GREENAMEYER, Pl'ff,
vs.
ISAAC C. COATE, Def't.

Comes now the plaintiff and objects and excepts to the order of this court made on this 4th day of June, 1904, sustaining the demurrer to the Amended Petition of plaintiff and prays leave of court to amend the same.

C. W. RANSOM,
Att'y for Plff.

Endorsed: No. 2314. District Court, Kay County, O. T. Greenameyer *vs.* Coate. Objection and Exception to order sustaining demurrer to petition. Filed June 4, 1904, Jay E. Pickard, Clerk By E. A. Burke, Deputy.

And thereafter, and on the 5th day of September, 1904, the plaintiff filed his second amended petition in the above entitled case, which reads in words and figures as follows, to wit:

45 In the District Court of the Territory of Oklahoma in and for Kay County, Sitting with the Powers of a District Court of the United States, Within and for Said County and Territory.

JOHN R. GREENAMEYER, Plaintiff,
vs.
ISAAC C. COATE, Defendant.

Second Amended Petition.

Now comes the plaintiff, John R. Greenameyer, and by leave of Court files this his second amended petition herein, and for his cause of action against the above named defendant, Isaac C. Coate, alleges and shows to the court as follows:

That pursuant to the act of Congress approved March 3rd, 1893, and the proclamation of the President of the United States, thereunder, issued and dated August 9, 1893, that portion of the Territory of Oklahoma known as the Cherokee Outlet was opened to settlement under the terms of the settlement and homestead laws of the United States to wit: on the sixteenth day of September, 1893, at Twelve o'clock noon, Central Standard time of that day; that this plaintiff was then a native born citizen of the United States, and the head of a family and over the age of Twenty One years and had theretofore served as a duly enlisted soldier in the Army of the United States during the war of the rebellion for a period of more than two years, and was honorably discharged from said army and service on September 13, 1865; that he had never prior to the date next hereinafter mentioned made any entry under the homestead

laws of the United States or filed any Soldier's Declaratory statement for any of the Public Lands of the United States and was not at said date, or at any time since, the owner of One Hundred and Sixty acres of land in any Territory or State of the United
46 States, and was on said date and at all time since in all other respects fully qualified to make and enter a Soldier's Declaratory Statement and Homestead Entry for the tract of Land next hereinafter described; that plaintiff had not in any manner violated the Act of Congress or the Proclamation of the President opening said lands to settlement as aforesaid, by entering upon or occupying any part thereof prior to 12 o'clock noon, Central Standard Time on September 16, 1893. That on September 15th, 1893, plaintiff duly procured from one of the Booths, established under the terms of said proclamation, a Certificate in due form, entitling this plaintiff to file a Soldier's Declaratory —, and perfect a homestead entry for a quarter section of the lands so opened to settlement as aforesaid.

That being as aforesaid in all respects duly qualified as aforesaid, this plaintiff on the 19th day of September 1893, at the United States Land Office at Perry, being the Land Office of the Land District in which the tract hereinafter mentioned was then situated, filed in due form his application for a Soldier's Declaratory Statement for all of that Tract of Land, being a portion of the lands opened to settlement as aforesaid, and known and described as Lots one and two, and the East one half of the northwest quarter of Section Eighteen of Township Twenty Sixth north of Range two east of the Indian Meridian, the same being now situated in Kay County, Territory of Oklahoma, the same then being a part of the public domain and subject to entry at said Land Office, and said application so filed as aforesaid, was thereupon received by the Register of said Land Office, and plaintiff there and then paid the fees and commissions upon said application as fixed by law, to the Receiver of said Land Office, and thereupon said Soldier's Declaratory Statement was by said officers entered and filed upon the records of said office as Soldier's Declaratory Statement, Number 53; that said
47 tract of land at the time of filing said Declaratory Statement was vacant and unoccupied by any legal settler, and the same was then subject to appropriation by such filing and Declaratory Statement under the Homestead Laws of the United States. That thereafter and within due time, and to wit, on the Eighth day of March 1894, plaintiff again appeared before said Land Office and then and there transmuted his said Soldier's Declaratory Statement by making, upon application and payment of all fees and commission, then and there in due form, Homestead Entry Number 5588, and upon the same date plaintiff moved a house upon said tract and took up his residence upon said tract, and there duly continued to live and reside with his family for seven years next following the date last above named, and during said period each year, plaintiff cultivated Forty acres of said tract and cropped the same, and for each of said seasons plaintiff grazed Forty acres of said tract in addition to the lands cultivated as aforesaid, and likewise placed upon said tract a good dwelling house, a barn, cow shed, wagon shed, hog

pens, dug out, and fenced Eighty acres of said tract with post and wire fence around said Eighty acres and a cross fence separating the same into Forty acre lots, said improvements being of the value of Four Hundred and Fifty Dollars. That after residing upon said tract and cultivating the same in the manner aforesaid, plaintiff made application in due form at said United States Land Office, to make final proof for said tract upon said homestead entry, and offered to pay the fees and commissions thereon which said application was rejected, and not allowed by the Register and Receiver of said officer; that plaintiff has done each and every other act requisite and necessary to obtain patent to said tract as required by the Homestead and other laws of the United States in such case made, and provided.

48 That on November 24, 1893, the defendant, Isaac C. Coate, appeared before said Land Office and then and there made Homestead Entry for said above described tract, which said entry was then and there allowed and expressly made as subject to the aforesaid Soldier's Declaratory Statement of this plaintiff; and which entry was by law excluded and cancelled by the act of this plaintiff in transmuting said Declaratory Statement into said Homestead entry No. 5588 on the 8th day of March, 1894; that after his said entry was as aforesaid excluded from the records of the Land Department, and to wit, on the 28th day of March 1894, the defendant filed in said land office an application to contest the entry of this plaintiff for said tract, which said contest charged that said defendant was the prior settler upon said tract and asked a hearing upon said question; that thereafter a hearing was had upon said contest and charge between these parties at the United States Land Office, at Perry, Oklahoma Territory, and decision was thereupon duly had in said case, and a copy of said decision is hereunto attached and marked Exhibit "A" and hereby made a part of this petition:

That subsequently said contest cause was duly appealed and upon said appeal came on to be considered in due course before the Commissioner of the General Land Office, and was by said officer duly considered and determined by decision of date July 25, 1896, a copy of which said decision and judgment is hereunto attached and marked Exhibit "B" and is hereby made a part of this petition.

That subsequently said contest cause was duly appealed from said decision of the Commissioner of the General Land Office and upon said appeal came on to be considered in due course by and before the Secretary of the Interior, and was by him thereupon duly considered and the issues therein adjudged and decided by decision and judgment of the Secretary of the Interior, of date June 21,

49 1898, a copy of which said decision is hereto attached and marked Exhibit "C" and hereby made a part of this petition, which said decision expressly found that the acts of settlement performed by defendant Coate upon this tract prior to the filing of plaintiff's Declaratory statement as aforesaid, as by him given and stated, did not in law constitute him a *bona fide* settler upon this tract; that said acts were wholly insufficient under the law to

segregate said tract and appropriate the same to the use of the said Coate; that the said Coate performed no sufficient act or acts upon said tract to constitute settlement until long after plaintiff filed his Soldier's Declaratory Statement as aforesaid; and that the rights of this plaintiff in and to the said tract were both prior and superior to any rights of defendant therein.

Subsequently, the defendant filed in due time and form, his motion for review of said decision of the Secretary of the Interior which said motion came on to be considered in due course, and was by the Secretary of the Interior denied by decision and judgment of date of October 5th, 1898, a copy of which said decision is hereto attached and made a part of this petition, and marked Exhibit "D" in which said decision he in all things reaffirmed his aforesaid findings and conclusions and finally dismissed the contest of defendant and closed the case awarding the right of entering said tract to this plaintiff.

That subsequently said Coate filed a petition for re-review of said decision, and for rehearing in said cause, addressed to the supervisory power and authority of the Secretary of the Interior, which said petitions were entertained, and on February 7, 1899, a rehearing ordered in said cause, and the same was remanded to the local land office for further hearing upon questions of fact, and said petition for re-review was denied.

50 That thereupon said cause was again set for trial and duly heard in said local land office, and decision was therein duly rendered by the Register and Receiver of said Land Office, a copy of which said decision is hereto attached and made a part of this petition and marked Exhibit "E."

That thereupon said cause was duly appealed and came duly on for consideration upon said appeal before the Commissioner of the General Land Office, and decision was thereupon rendered, a copy of which is hereto attached and marked Exhibit "F" and made a part of this petition.

That thereupon said cause was duly appealed to the Secretary of the Interior from said last mentioned decision, and the same was considered by the Secretary of the Interior, and upon the 3rd day of July, 1900, decision was thereupon rendered and entered. A copy of which said decision is hereto attached and marked Exhibit "G" and hereby made a part of this petition.

That thereupon this plaintiff duly filed his motion for review of said last mentioned decision, and said motion came on for consideration in due course and was by the Secretary of the Interior denied, and said cause was thereupon closed, and the entry of this plaintiff was cancelled and his claim for said tract was held for naught, a copy of which said decision is hereto attached and marked Exhibit "H" and hereby made a part of this petition; and thereupon said cause was finally closed, and the entry of said Isaac C. Coate was re-instated and his rights in and to said tract were held to be both prior and superior to those of this plaintiff, that said cause has since said date remained closed in the Land Department.

That subsequently the said Isaac C. Coate submitted final proof and prior to the commencement of this action secured patent from

the United States for said above described tract and now
51 holds the legal title to said tract thereinunder.

That plaintiff is in equity the rightful owner of said above described tract and is entitled to have the legal title of said land vested in him by decree of the court by reason of the facts above set out as to his claim to said tract and his compliance with all of the requirements of the homestead laws, as aforesaid, and by reason of mis-application of law on the part of the Land Department in said contest cause in the decisions above set out and marked Exhibits "A," "B," "C," "D," "E," "F," and "G," and that by the proper application of the law to the facts as proved in said cause and found by the said decisions, the claim of this plaintiff to said tract should have been finally held prior and superior to the claim of said defendant, and patent conveying title to said tract should and would have been made and delivered to this plaintiff; That said misapplication of law of which plaintiff now complains was in the respects as follows, to wit:

That the department held in said decision of July 3, 1900, that the act of Coate in setting a stake upon this land, and digging a small hole not more than a spade or two deep and a couple feet across, said acts being all of the visible improvements placed by him under the facts as found upon said tract prior to the date and time of the filing of plaintiff's Declaratory Statement as aforesaid, did as a matter of law amount to and constitute such acts of substantial and permanent character as to appropriate the land and initiate a valid right of settlement thereto, from the date and time of said staking; that said acts were sufficient to initiate and preserve such prior settlement rights in and to this tract, notwithstanding the further fact as found, that said Coate before performing any other or different act upon said tract left said tract and returned to his home in the state of Kansas, and there remained for the period of over a month after said declaratory statement was placed on record.

52 That upon precisely the same state of facts the Department held in said decisions of June 21, 1898, as follows:—

"After a thorough examination of the testimony, the Department is of the opinion that the acts of Coate were insufficient to hold the land against the Soldier's Declaratory filing of Greenameyer."

"If it should be conceded that everything claimed to have been done by Coate in the way of settlement, were true, his said acts would not in the judgment of this department, constitute him a *bona fide* settler prior to the 19th day of September, 1893, when the defendant made his declaratory statement of record."

Coate reached the land between one and two o'clock on the afternoon of the opening and remained on or adjacent to the claim until the 20th, four days. All that he did in these four days was to stick his flag and dig a hole which he calls a starting of a well, two feet deep and two and a half or three feet across. He then left and went back to his home in Kansas, 150 miles distant. The digging of this hole would not require more than an hour's labor by one man. This was all he did between the 16th and 20th, while he remained on or near this claim to his return to Kansas, the rest of this time he spent

"watching people off" of the claim and in going to Newkirk on the 19th to "file by mail." He did not return to the claim after leaving on the 20th of September until the 22nd of October, and his return at that time was due to the fact that he received a letter from one White, stating a soldier had filed on the land.

That the first of these aforesaid diverse ruling- and holdings of the Department upon the same state of facts is a misapplication of law; that the true rule and application of law to said facts is as set out in the quotation last above set forth, and under such cor-
53 rect application of law to said facts it must follow that Coate initiated no valid claim to this tract of land prior to the filing of plaintiff's aforesaid Declaratory statement; that the final judgment of the Department cancelling the entry of this plaintiff and confirming the right and claim and entry of said Coate was based solely upon said erroneous application of the law to said facts.

Plaintiff further assigns error and misapplication of law in said decision in the respects following, to wit:

That said decisions of date June 21, 1898, and October 5th, 1898, were rendered by said C. N. Bliss, then the duly acting and appointed and qualified Secretary of the Interior; that said decision of date July 3, 1900, was rendered by a successor of said C. N. Bliss in said office of Secretary of the Interior, to wit, E. A. Hitchcock. That the decisions so made as aforesaid by the said C. N. Bliss, were had and rendered upon the same state of facts, as to the initial acts of settlement performed by Coate upon this tract as that upon which said decision rendered by said E. A. Hitchcock was rendered. That the decision of said E. A. Hitchcock, the successor in office of said Bliss, was had upon the same issues of law in the matter of the sufficiency of said Coate's said initial acts, as were theretofore determined by his said predecessor in office, and said later decision is in fact and effect a mere reversal by the said E. A. Hitchcock, Secretary of the Interior, of the decision and opinion and judgment of his predecessor in office; that E. A. Hitchcock, as successor in said office of the Secretary of the Interior was without power, authority or jurisdiction to reverse the final decision aforesaid of his said predecessor in said office; that the said decision of July 3rd, 1900, reversing as aforesaid said decisions of June 21, 1898, and October 5th,
54 1898, was, therefore, without legal force or effect. That the rule of law applicable to said question of the sufficiency of Coate's said flag and small excavation governing in the Land Department, when the law is correctly applied as to the powers of said E. A. Hitchcock in said premises, is as laid down by his said predecessor in office. That it was a misapplication of law on the part of the Department to cancel the entry of this plaintiff for said tract, and re-instate that of defendant for said tract. That if the law aforesaid had been correctly applied by the Department, the entry of this plaintiff for said tract would have been confirmed, his application for final proof granted and patent and title delivered and conveyed to him for the tract in question.

Second Cause of Action.

The plaintiff for a second and separate cause of action here again makes all of the statements and allegations hereinbefore set forth in his first cause of action, a part of this his second cause of action, the same as if herein set out at length and further alleges:

Plaintiff shows to the court that in said contest cause, and in the matter of the filing and making of said homestead entry of the said Isaac C. Coate as above set forth, the defendant prevailed by and through fraud and imposition, both upon the Land Department and upon this plaintiff, which said fraud and imposition was the cause of plaintiff's defeat in said litigation, and the cause of said tract being awarded to defendant by the Land Department; that said fraud was accompanied by deceit and cunning on the part of the said Coate, whereby he succeeded in concealing his fraudulent acts and practices from this plaintiff to such an extent that plaintiff in said contest was wholly unable to secure the evidence to prove said fraud in said contest case; that as soon as defendant Coate filed as aforesaid upon the above described land, to wit; on or about December 1st, 1893,
55 plaintiff learned that said defendant then was the fee owner of and in possession of 160 acres of land located in Morris County, Kansas, that afterwards, to wit, on or about December 20th, 1893, plaintiff obtained an abstract of the Registry records of said Morris County, which said abstract showed the defendant then to be the fee owner of 180 acres of land hereinafter described and designated in exhibit "X" attached hereto; that afterwards, to wit, on or about July 9th, 1894, and soon after said defendant had instituted his contest proceedings in the Land Department as above set forth, plaintiff visited Council Grove the County seat of said Morris County, and there made inquiries concerning land so owned there by defendant as aforesaid, and plaintiff then learned that defendant had prior to that time and to wit, on the 27th day of January, 1894, caused the deed hereinafter mentioned and attached hereto marked exhibit "X," and hereinafter alleged herein by plaintiff to be fraudulent to be placed on record in said Morris County Registry of deeds; that plaintiff then made an effort to obtain proof with which to make a showing before the land department in said contest; that said last mentioned conveyance was fraudulent as hereinafter set forth, but at that time plaintiff was unable to obtain such proof; that afterwards, to wit, on or about the 7th day of January, 1899, and while said contest was pending before the Land Department, plaintiff employed an attorney and sent him to said Morris County, to investigate the validity and good faith of the defendant in the transaction last above mentioned culminating in the making and recording of said deed last above designated; that said attorney spent a week's time in and about said Council Grove, investigating the premises and hunting proof to substantiate plaintiff's theory that said deed was fraudulent as aforesaid; that said attorney wholly failed to obtain such proof and the same never was available to or used by
56 plaintiff during the pendancy of said contest in the Land Department; that afterwards, to wit, on or about the 1st day of March, 1901, and after said contest proceedings were

closed in the Land deparment and he entry of said defendant in the premises was reinstated and his rights in and to said tract of land were held by the Department to be prior and superior to those of this plaintiff, plaintiff first learned of the existence of proof sufficient to substantiate the allegations of fraud and imposition on the defendant's part hereinafter enumerated; that the nature of said fraud and imposition was such that defendant could readily conceal and did conceal the same from plaintiff, and withhold the evidence and proof thereof from the plaintiff and the Land Department; and so plaintiff avers that he exercised all due diligence to discover the evidence and facts concealing said fraud and imposition on the part of said Coate, but was prevented and forestalled in securing the facts, evidence and proof of such fraud by the wrongful conduct of the defendant, and his aforesaid deceit, concealment and imposition.

Plaintiff further shows that the nature of said fraud and imposition, and its materiality and effect, is as follows, to wit:

That under the terms of the Homestead Laws of the United States certain qualifications are required to be shown and proven by each entry-man of lands under said laws; that one of the qualifications so required by law to be shown and proven is and was the fact that the claimant or entry-man was not at the date of the initiation of settlement or making of entry the owner of 160 acres of land or more in the United States; that under this provision of the Homestead Law which was in full force and effect at all times since the opening of the Cherokee Outlet as above set forth, it became necessary and material for the said Isaac C. Coate to aver and prove as one of such necessary qualifications under the Homestead laws that he was not the owner of 160 acres of land or more in the
57 United States at the time of the opening of said outlet to settlement and at the date of his said Homestead entry; that the said Isaac C. Coate, prior to said opening, was the owner of a tract of land in the State of Kansas in the year 1893, said tract consisting of more than 160 acres, and, to wit, 180 acres, and said defendant continued to own said last mentioned tract until on or about the 27th day of January, 1894; that while owning said last mentioned tract said Coate found that it was necessary to dispose of said land in order to make proof of his qualifications as aforesaid, to take and enter and hold the tract in question in this action; that to enable him to make said proof before the Land Department of said qualifications and while owning said tract of land as aforesaid, and to wit, upon the 27th day of January, 1894, the said Coate did make a certain fraudulent, false and misleading instrument in writing purporting to convey said lands to one A. C. Midkiff, his son-in-law, which said instrument was as then made in the form as set forth in exhibit "X" which same is a copy of said instrument and is hereby attached hereto and made a part of this petition.

That said last mentioned instrument was false and fraudulent and misleading in this, to wit, that while it was made and executed on the 27th day of January, 1894, after defendant's entry and claim was initiated, said instrument was ante-dated and on its face made

to appear to have been made, executed and delivered prior to the entry of said Coate as aforesaid, and, to wit, on the 30th day of August, 1893, and by this fraudulent means said Coate caused it to appear that he had sold and conveyed said 80 acres of land on the 30th day of August, 1893, when in truth and in fact he continued to own the same as aforesaid, and was thereby disqualified from taking and holding any interest in the land involved in this action until the 27th day of January, 1894.

58 That after making and executing said false and fraudulent deed of conveyance the said Coate, in pursuance of said fraudulent scheme and design, and with intent to deceive this plaintiff and the Land Department in said contest cause, with respect to his qualifications to make entry and hold this tract, did by and through his said son-in-law A. C. Midkiff, cause said instrument to be placed on record in the office of the Register of Deeds of the County in which said tract of 180 acres was located as aforesaid, thereby causing said record of said County to apparently show the fact that said Coate had sold and conveyed said tract as aforesaid, prior to the initiation of any claim to this tract on his part; that having thus caused said public record to show such apparent fact of the conveyance of said tract on August 30th, 1893, the said Coate did thereafter procure and use, and introduce in evidence in said contest cause, with the intent to deceive the Land Department and defraud this plaintiff, a certified copy or statement from said record to establish the aforesaid necessary elements of his qualification to make Homestead Entry for and settlement upon the tract involved in this action, and did thereby impose upon the Land Department and cause them to believe and find that said conveyance was made prior to the date of his settlement upon and entry for this tract, and that he (the said Coate) was in said respect not the owner of 160 acres of land at the date of his entry and alleged settlement upon this tract, whereas he (the said Coate) was at all times prior to January 27th, 1894, the owner of and in possession of the said tract of land so purported to have been by him conveyed to Midkiff as aforesaid in August, 1893.

That by that reason of said fraudulent practices, instrument, and certified statement so introduced in evidence by said Coate in said contest cause as aforesaid, said Coate did cause the land De-

59 partment to find that he had conveyed said tract of 180 acres before he had initiated claim to the tract involved in this action, and that he was, therefore, fully qualified to make settlement upon and entry for this tract, and was entitled to take and hold the same as ag-inst the adverse claim of this plaintiff and thereby caused the Land Department by its aforesaid final decision in said contest cause to cancel the entry of the plaintiff and confirm the entry of the defendant for the tract in dispute in this action.

That had it not been for said fraudulent act, practices, imposition and concealment, of the defendant above set forth, the fact would have been proven and established that said Coate did own 160 acres of land and more at the time this plaintiff filed his Declaratory Statement as aforesaid, and at all time thereafter, continued to own

said land until the 27th day of January 1894, and which proof would in law have caused the Land Department to have found that said Coate was not qualified to make entry for or settlement upon the tract in dispute in this action, and have caused said Department to have, therefore, awarded this tract to this plaintiff, confirmed his entry and cancelled that of said Coate and dismissed his claim and contest for this tract:

That plaintiff has but recently discovered, as aforesaid, the evidence to prove the foregoing charge of fraud, concealment and imposition, and is now able and ready to prove the facts as above set forth:

The plaintiff hereby tenders and offers to pay into court all necessary fees and commissions expended by said defendant in securing his final proof and patent for said tract involved in this action, as well as all proper charges in said behalf expended by the defendant.

60 Wherefore, plaintiff prays that he be declared the owner of the tract of land first above described; that the court decree that the defendant holds the legal title to said land in trust for plaintiff herein; that the above named defendant by decree of Court be required to convey said legal title to plaintiff, and in default of defendant to so convey, that a commissioner be appointed by the court to execute such conveyance, and for all other and further relief touching the premises to which he may be entitled, and for costs of this action.

KEITH & WRIGHT AND
C. W. RANSOM,
Att'ys for Pl'ff.

61 STATE OF KANSAS, *County of Sedgwick,* ss:

Personally appeared before me John R. Greenameyer who being duly sworn on his oath deposes and states that he is the plaintiff above named; that he has read the foregoing petition and knows the contents thereof, and that the statements herein set forth are true as he is informed and verily believes; that all of the statements therein set forth as to plaintiff's rights to said tracts by way of filing, entry, residence, cultivation and improvements on his part, are true of his personal knowledge.

JOHN R. GREENAMEYER.

Subscribed and sworn to before me this 3rd day of September, 1904.

[NOTARY SEAL.] C. A. MATSON,
Notary Public.

My commission expires on the 31 day of January, 1906.

62

EXHIBIT "A."

Before the U. S. Land Office, Perry, O. T., Oct. 24, 1895.

ISAAC C. COATE,
vs.
JAMES GREENAMEYER.

Involving lots 1 & 2, & S. ½ of N. W. ½ of S. 18, T. 26, R. 2 E.

Decision of Register and Receiver.

On the 19th day of Sept., 1893, the defendant filed his soldier's declaratory statement No. 53, and on the 8th day of March 1894, he transmuted the same into H. E. 5588.

On the 24th day of Nov. 1893, Isaac C. Coate made H. E. No. 4447, subject to the S. D. S. of Greenameyer's.

On the 28th day of March, 1894, Coate filed contest affidavit in this office, alleging settlement on the land on the 16th day of Sept., 1893, and that the same was prior to the filing of the S. D. S. of Greenameyer, and prior to any settlement made by Greenameyer.

On the 17th day of Aug. 1895, notices were issued setting the case for a hearing on the 8th day of Oct. 1895.

On the 8th day of Oct. 1895, both parties appeared in person and by counsel, and the local officers being engaged in hearing other causes at the time, this cause was set for the 17th day of Oct. 1895, at which time both parties appeared in person and by counsel, and the cause was continued until the 18th day of Oct. 1895.

On the 18th day of Oct. 1895, litigants and their counsel appeared, and the hearing of this cause was prece-ded with.

Isaac C. Coate introduces evidence to show, that on the 16th day of Sept. 1893, at 12 o'clock noon, he made the race from the north line of the Cherokee strip to the land in controversy, with his son, on the running gear of a wagon, riding on a board, two
63 horses pulling the vehicle; that he arrived on this land at about 1:15, or 1:20 P. M., immediately setting a stake five feet high with a red flannel flag attached thereto, about 15 rods southwest of the northwest corner and about 12 rods from the east line; on said afternoon he started a well 3 feet in diameter and 2 spades deep, about 45 feet south of the north line and 12 ft. west of the east line; his son Chas. S. Coate being with him and staying upon the land on said afternoon, sleeping thereon, his wagon being near the excavation; that now said well has been dug to the depth of 23 ft. and completed.

That upon the 17th day of said month he remained upon the claim warning people off, and sleeping thereon; and upon the 18th day of said month he was upon the claim; that his wife and son came to the land about 9 or 10 o'clock of said day; that he slept upon the land; that his wife and son slept on the Day claim 10 or 12 yards from this land, in a shelter placed in the creek bottom for the reason that the prairie had been burned off, and high wind was

blowing, and in said creek bottom they were protected from the wind, dirt and ashes; that upon the 20th day of said month he went overland with his team, wife and son to his former home in Kansas, a distance of 150 miles, to get tools and provisions, having made arrangement with Mr. White before leaving to plow upon the land, which White did between the 7th and 15th day of Oct. by plowing a furrow on the north line and one ½ way on the west line; on the 25th day of Sept., reaching his home in Kansas, having been caught on his route in a water spout, caught cold and was detained in Kansas three weeks.

On the 17th day of Oct. 1893, leaving Kansas and arriving on the land on the 22nd day of Oct. with tools and provisions and feed and wife and two children. On the 23rd day of Oct. com-
64 mencing his residence, which was finished the next day, placing therein a stove, bedding, table and other small articles, his house being a box house 10 ft. square, with a door and no window; plowed a strip on the north line 12 ft. wide and ½ mile long; in 10 days his wife, returning to Kansas for "more things." On the 19th day of Nov. he came to Perry to file and on the 24th day of Nov. did file returning to the land the same afternoon. On the 27th day of Nov. he left the land for Kansas, as he was sick, leaving his household goods in the house, and giving the key thereof to White, reaching his former home on the 28th day of Nov. and returning to the land again on the 10th day of Feb. 1894, bringing with him horses, and cows and chickens, and corn and hay, and household goods, and tools and family, proceeded to break 8 acres of land and sowing in oats 12 to 15 acres of corn; building an addition to the house 14 by 26 and constructing other improvements.

James Greenameyer stands upon this declaratory statement and his transmuted homestead entry and introduces evidence to dispute the alleged settlement of Coate on the land, contending that his flag and his well were not on this land prior to the filing of the S. D. S. on the 19th day of September 1893; that Coate and his family were camped on Day's land and had no settlement on this land prior to the filing of the declaratory statement; that Coate's house was not inhabitable was not inhabited, and that the household goods claimed by him to be therein were not. It is unnecessary to cite the evidence as to Greenameyer's residence or improvements upon the land, as they cannot be disputed other than briefly to say that he built his *a* fence in Dec. and in March of 1894, within 6 months from the filing of the S. D. established residence upon the land, and that his improvements have been valuable and in compliance with the law. The evidence is conflicting as to
65 these early acts of settlement claimed by Coate. It is true that in numbers Greenameyer introduces the most people, who testify that they were at or near this northeast corner of the land, most of them for the purpose of examining the land, and that the flag and well were not there, or that they did not see them and were in a position to have observed them; this is met by the direct and positive testimony of the plaintiff's witnesses, who tes-

tify to having seen them, some of them testifying to having seen the plaintiff plant the flag and dig the well.

We conclude that these acts claimed by the plaintiff were performed by him. We are not advised as to the seriousness of his malady which detained him in Kansas from the 27th day of Nov. 1893, till the 10 day of Feb. 1894, but as he says he was detained on account of sickness, and this statement is not contradicted, we conclude that the same was true. Even if he was ailing, to have remained away from the land after having done sufficient things to segregate the same from the public domain, from the 28th day of Nov. 1892 till the 10th day of Feb. 1894, mid winter, was not fatal to him, as to the residence built respectively by each party litigant honors seem to be easy.

We conclude from the evidence that the plaintiff was the prior settler on this land, that his settlement was prior to the filing of the S. D. S., that his residence and improvements were established and made within a reasonable time, that he should prevail in this suit.

We therefore recommend the cancellation of the homestead entry of Greenameyer, and that the homestead entry of Coate remain intact.

Thirty (30) days for appeal.

LOUIS DAVIS, *Register.*
J. H. KINTZ, *Receiver.*

66 We hereby accept service of the above and foregoing decision by a true and exact copy of the same this the 24th day of October, 1895.

MORRIS, JOHNSON & KELLOG,
Att'ys for Coate.
HAGGART & CARRUTHERS,
Att'ys for Greenameyer.

67 EXHIBIT "B."

H. Doc. 7. C. C. W. W. W. O. D.
J. A. S. Case 9501 T. W. A.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *July 25th,* 1896.

ISAAC C. COATE,
v.
JAMES GREENAMEYER.

Involving the N. W. ¼ Sec. 18, T. 26 N., R. 2 E.

Register and Receiver, Perry, Okla.

SIRS: On Sept. 19, 1893, James Greenameyer in person filed S. D. S. No. 53 for lots 1 & 2 and S. ½ of N. W. ¼ Sec. 18, T. 26 N. R. 2 E.

On Nov. 24, 1893, Isaac C. Coate made H. E. No. 4447 for the same land, subject to said filing but made no allegation of prior settlement thereon.

On March 8, 1894, said Greenameyer transmutted his S. D. S. No. 53 to H. E. No. 5558 for the same land.

On March 28, 1894, said Coate filed an affidavit of contest against Greenameyer's entry alleging settlement on said land on Sept. 16, 1893.

On May 1, 1895, Coate filed a supplemental affidavit alleging that Greenameyer failed to establish his residence on said land within 6 months from the date of his filing and that he failed to settle upon and cultivate the same as required by law, and that he had not maintained his residence thereon.

68 On August 17, 1895, notices issued for a hearing on October 8, 1895, and on that day the case was continued to October 18th, when both parties appeared in person, and the defendant filed an application for a continuance for ten days on the ground that certain depositions taken under commissions previously issued, had not been received.

This motion was overruled, but you stated that "if said depositions arrived before the close of this case they may be introduced," and that you would take under advisement the question whether such depositions would be considered if introduced after the close of the case.

On Oct. 22, 1895, all of the depositions had not been received and the case was closed, and they were not subsequently introduced.

You found from the evidence that the plaintiff settled on said land prior to the date of defendant's filing, and you recommend that the latter's entry be canceled.

The defendant appealed, assigning as error your refusal to grant the continuance asked for, and your findings in favor of the plaintiff.

The testimony submitted by the plaintiff shows that he made the race in a wagon drawn by two horses and that he staked the land about 15 rods S. W. of the N. E. corner, between one and two o'clock on Sept. 16, 1893; that the same afternoon he commenced a well from 7 or 8 inches to "two spades" deep, according to different witnesses, and he slept on the land that night; that his wagon was on the claim during the afternoon, and on the next day, he sent his son with it after his wife who arrived on the 18th; that they camped on an adjoining claim with a Mr. Day to get out of the dust and smoke; that on the 20th he returned to his home in Kansas with his team, a distance of 150 miles, to get his breaking plow and his traps to improve his claim; that at his request a neighbor plowed a few furrows on the land between Oct. 7,

69 and 15, 1893, which obliterated the well which it is alleged was commenced on Sept. 16th; that the neighbor who was watching the claim notified him in October of Defendant's filing and he returned to the land with his wife and two boys on October 22, 1893, leaving one of his sons to take care of home place in Kansas; that on October 23rd he bought lumber costing $2.00 or $2.25 and put up a shanty with one door, and no window, and after

it was completed his wife and children returned to his Kansas home, and he stayed in the vicinity of the land and at Perry until he made his entry on Nov. 24, 1893, and three days later he also returned to Kansas, and he continued to live there until Feb. 10, 1894, when he transferred his effects—a car load or more—to Oklahoma; that he and his family lived at a neighbor's until he built a house suitable for them to live in, and five days later he established his residence upon the land, and has resided there continually since. Plaintiff estimates his improvements to *ne* worth probably $300.00.

The defendant testifies that he made his filing on Sept. 19th and on the 20th he examined the land and found a stake and flag perhaps 25 rods west of centre and 8 rods north of the south line of the tract on which the name of Hatfield was written; that there was no stake or flag or a well commenced, at the points where plaintiff claims to have staked; that he first learned that the plaintiff claimed this tract on Nov. 2, 1893, and he then examined the tract again; that he found six furrows fresh plowed on the north line and a small shack about 7 x 8 feet, where he met the plaintiff; that there was nothing in the shack but an old plow, an old box, and a camp sheet-iron stove, without pipe, which had never had a fire in it, and there was no hole in the roof for a pipe. Defendant further testifies that he fenced the tract in December, 1893;
70 that on March 8, 1894, he bought a house and moved it on the land, that he broke about 15 acres and planted corn and about 1½ acres in garden stuff, and established his residence thereon and has resided there continually since. He estimates the cost of his improvements at $450.00.

Martin Tooman testified that while surveying section lines on Sept. 18th, he was at the northeast corner of this tract for 20 minutes, and there was no hole dug at the point claimed by plaintiff and he saw no flag; that plaintiff was camped on the N. E. ¼ of said section; that plaintiff and his witness Day, were there and showed him the corner; that one of his party asked them if they had got anything yet (meaning claims) and one of them answered, not yet, but was not quite certain which one answered.

John Greenlee, in his deposition, stated that he settled on the S. W. corner of the N. E. ¼, same section, about one o'clock on Sept. 16th, and was there until sundown of that day and all the following day, and thereafter "off and on" until the latter part of October, 1893; that he could see all over the tract from where he was located and saw two men and a mule on the western part of this tract all the afternoon (16th), and that he first saw the plaintiff on Sunday afternoon, the 17th in camp on his (witness) claim (N. E. ¼); that there were no improvements on the tract in dispute and none were made prior to October 1st; that he knows this because he was over the tract several times; that there was nothing on the tract except 2 or 3 poles, 8 or 10 feet high, with flags, and several smaller stakes on the *west* side, and *at* the N. E. corner there was a stone and 2 or 3 small holes about 2 feet square and 1½ feet deep; that he was on and over this tract on the 17th and

none of plaintiff's effects were thereon; that he was then in camp on the N. E. ¼ and it is not a fact that a well was started on the tract in dispute on the 16th.

71 John T. Hill, who lives on the S. E. ¼ Sec. 7, testified that he examined this tract on Sept. 23rd, or 24th, when looking for a claim for himself, and saw no improvements thereon; that there was a sapling set up at the N. E. corner and 2 or 3 shovelfuls of dirt had been thrown against it, but saw no flag there, and he did not take the tract himself because he learned that there was a filing on it.

Plaintiff's entry was made subject to defendant's filing, and the latter's entry, settlement and improvement having been made within the prescribed time, his right related back to the date of his filing and operated to exclude the intervening claim, unless the plaintiff made a valid settlement prior to the filing.

The evidence shows that it is doubtful whether the plaintiff made any claim to, or settlement on, this tract of land on September 16, 1893. If he did claim the land on that day and put up a stake and dug a hole for a well, which was obliterated by the first plowing, I do not think that they were sufficient acts of settlement, in view of the fact that immediately thereafter he left the Territory. Thompson *v.* Jacobson, 2 L. D. 620; Howden *v.* Piper, 3 L. D. 162, Strutz *v.* Crabb, 19 L. D. 122.

But admitting that he performed such acts at the time alleged, and that they constituted a good settlement, his failure to establish his residence on the land for nearly five months thereafter was fatal to his claim.

I therefore reverse your decision and hold plaintiff's entry for cancellation.

Advise both parties of this decision and the plaintiff of his right of appeal.

Respectfully,

E. F. BEST,
Asst. Commissioner.

72 Endorsed: 2994. July 25, '96 July 28 '96. Isaac C. Coate *v.* James Greenameyer. N. W. 4. 18, 26, 2 E. Pl'ff's entry held for cancellation. Advise both parties & pl'ff of his right of appeal.

73 EXHIBIT "C."

24-837. DEPARTMENT OF THE INTERIOR,
WASHINGTON, *June* 21, 1898.

ISAAC C. COATE
vs.
JAMES GREENAMEYER.

The Commissioner of the General Land Office.

SIR: September 19, 1893, James Greenameyer, filed his soldier's Declaratory Statement for lots one and two and the S ½ of the NW. ¼ of Sec. 18 T. 26 N. R. 2 E. Perry, Oklahoma,

November 24, following Isaac C. Coate made homestead entry for the same tract but did not allege settlement prior to the filing of Greenameyer.

March 8, 1894, Greenameyer made entry in pursuance of his said Declaration. On the 28th of the same month, Coate brought Contest against Greenameyer's entry alleging priority of right by reason of settlement made on September 16, 1893, the day the land was opened to settlement, and on May 1, 1894, he filed a supplemental affidavit charging that Greenameyer had failed to establish residence within six months of the filing of his declaratory statement and also that he had failed to settle upon or cultivate the same, or maintain his residence as required by law.

Hearing was had and the case closed, October 22, 1895. Two days later the register and receiver registered their decision finding that Coate had made settlement prior to the filing of Greenameyer's soldier's declaratory statement, and recommended the cancellation of Greenameyer's entry, and that the entry of Coate remain
74 intact.

Greenameyer, appealed and by your office decision of July 25, 1896, the decision of the local office was reversed. Coate's appeal brings the case here for consideration.

After a thorough examination of the testimony, the Department is of the opinion that the settlement acts of Coate were insufficient to hold the land as against the Soldier's Declaratory filing of Greenameyer.

If it should be conceded that everything claimed to have been done by Coate in the way of settlement were true, his said acts would not, in the judgment of this Department constitute him a *bona fide* settler prior to the 19th day of September, 1893, when the defendant made his Declaratory Statement of record. Coate reached the land between one and two o'clock on the afternoon of the opening, and remained on or adjacent to the claim until the 20th—four days. All that he did in these four days was to stick his flag and dig a hole, which he calls the starting of a well, two feet deep and two and a half or three feet across. He then left and went back to his home in Kansas, 150 miles distant. The digging of this hole would not require more than an hour's labor by one man. This was all that he did between the 16th and the 20th while he remained on or near the claim prior to his return to Kansas, the rest of this time he spent, "watchin" people off of the claim and in going to Newkirk, on the 19th to "file by mail."

He did not return to the claim after leaving on the 20th of September until the 22, of October, and his return at that time was due to the fact that he received a letter from one White stating that a soldier had filed on the land. On this trip he brought his wife and son with him. He put up a shack, 10 by 10 the day after he arrived and he says that when he got his house built his wife and boy went back north and that he "remained here to get his filing on."

This he succeeded in doing on the 24th of November, a
75 month after he moved on the land and built his shack. He returned to Kansas on the 27th of November, 1893, and re-

mained there until the 10th of February, 1894, when he returned with his family, stock, and household goods and built an addition to his shack and established permanent residence upon the land.

On his trip in October 1893, he plowed a strip from 8 to 12 feet wide along the north boundary of his claim and a small patch near his shack, and in so doing plowed over and filled up the hole which he described as a well. He also claims to have planted out "peach, cherry, wild goose, plum and gooseberries and blackberries, about 50 all told.

The lumber in the shack costs about $2.25, and Coate admits that it could not accommodate his family. In fact when he came back to the land in February, 1894, his family were compelled to stay with a neighbor until the addition was built.

He claims that ill health prevented him from returning sooner upon both trips back to Kansas. But the evidence upon this point is unsatisfactory. There is no physician's testimony or even certificate to corroborate it. Nothing but his own testimony to show it, and that does not show any serious ailment. He says that he had no doctor, that he caught cold from being caught in a "water-spout" on his first trip back, which interfered with his going about much, and for a short time kept him in bed. The foregoing is his own testimony about his acts of settlement. Some of his own witnesses failed to corroborate him as to the dimensions of the excavations he made on the 16th of September. One of them described the hole as being from twelve to fourteen inches deep and another says it was a foot deep, while the witnesses for Greenameyer all deny that there was any pretense of a well started. Some saw a few small holes where a few spadefuls of dirt had been taken out to pile around a brush set up at the north east corner of the tract where he claims to have
76 excavated this hole. Moreover, the testimony of the plaintiff is not calculated to impress one favorably, it seems to lack candor, and there is a perceptible attempt to glide over the pointed questions submitted on cross-examination and to evade a direct and positive answer, while in reply to questions that are favorable to him, he frequently elaborates and unnecessarily prolongs his answer: For his failure to perform some substantial act of settlement during the four days that intervened between his alleged settlement and the filing of Greenameyer, he offers no sufficient excuse, in fact, none, at all. If he had employed, this time in performing some substantial act of settlement instead of "watching" intruders and going to Newkirk to file by mail and had followed such acts with actual residence within a reasonable time, he would have established his priority of right as against the claim of Greenameyer. But in these essential features he has failed. Greenameyer has shown a substantial compliance with the requirements of law and his good faith is apparent. The decision appealed from is affirmed. The entry of Greenameyer is held intact.

The papers transmitted by your letter "H" are herewith returned.

Very respectfully, C. N. BLISS, *Secretary.*

77 EXHIBIT "D."

Vol. 24, No. 837.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *October* 5, 1892.

ISAAC C. COATE
vs.
JOHN GREENAMEYER.

Motion for Review.

The Commissioner of the General Land Office.

SIR: Isaac C. Coate has filed motion for review of departmental decision of June 21, 1898, affirming the decision of your office, dated July 25, 1896, in holding for cancellation his homestead entry for Lots 1 and 2, and the E. ½ of the N. W. ¼ of Sec. 18, T. 26 N. R. 2 E. Perry Land District, O. T.

Said homestead entry was made November 24, 1893. Prior to that date—to wit, on September 19, 1893,—John Greenameyer had filed soldier's declaratory statement for the tract. On March 8, 1894, Greenameyer made homestead entry in pursuance of said declaration.

On the 28th of the same month Coate brought contest against Greenameyer's entry, alleging priority of right by reason of settlement made on September 16, 1893. On May 1, 1894, he filed a supplemental affidavit charging that Greenameyer had failed to establish residence within six months after filing his declaratory statement, and that he had failed to settle upon and cultivate the same, or to maintain residence thereon as required by law.

A hearing was had, as the result of which the local officers found (1) as to Greenameyer's residence and improvements:

78 It is unnecessary to cite the evidence as to Greenameyer's residence or improvements upon the land, as they can not be disputed other than briefly to say that he built him a fence in December, and in March of 1894, within six months from the filing of his soldier's declaratory statement, established residence upon the land; and that his improvements have been valuable and in compliance with the law.

The correctness of the conclusion above set forth has not since been questioned at any stage of the proceedings; and the motion for review does not allege any laches on the part of Greenameyer.

The local officers found (2):

That the plaintiff was the prior settler on this land; that his settlement was prior to the filing of the soldier's declaratory statement; that his residence and improvements were established and made within a reasonable time; and that he should prevail in this suit.

The question of the sufficiency of the acts which Coate performed,

and upon which he rests his claim, is the sole question in issue in the case.

The motion for review alleges:

(1) Error in the consideration of said cause, and in connection therewith the misnomer of the defendant and erroneous description of the tract in said case.

It is true that said decision refers to the defendant as "James Greenameyer," when the signature to his homestead application and other documents show his name to be "John Greenameyer;" and that it refers to the land in controversy as being "the S. ½ of the N. W. ¼" when in fact it is "the E. ½ of the N. W. ¼." These clerical errors, however, have no bearing upon the merits of the case.

The motion alleged that, inasmuch as the register and receiver were present during the trial and participated in the ex-
79 amination of the witnesses, the Department erred in not giving their decision due weight and consideration, and "in not considering" their "findings of fact, based upon their knowledge of the parties and their witnesses."

The departmental decision complained of found the following, to be the facts:

If it should be conceded that everything claimed to have been done by Coate in the way of settlement were true, his said acts would not, in the judgment of this department, constitute him a *bona fide* settler prior to the 19th day of September, 1893, when the defendant made his declaratory statement of record. Coate reached the land between one and two o'clock on the afternoon of the opening, and remained on or adjacent to the claim until the 20th—four days. All that he did in those four days was to stick his flag and dig a hole, which he calls the starting of a well, two feet deep and 2½ or three feet across. He then left and went back to his home in Kansas, 150 miles distant. The digging of this hole would not require more than one hour's labor by one man. This was all he did between the 16th and the 20th, while he remained on or near the claim prior to his return to Kansas. The rest of his time he spent "watching" people off the claim, and in going to Newkirk on the 19th, to "file by mail."

The motion for review does not direct attention to any statement in the above summary of facts that is incorrect, nor point out wherein it differs from that embodied the local officers in their report. In fact, there is no difference. Except in the language used—as where the local officers describe the hole as being "three feet in diameter and two *spades* deep," and state that Coate occupied his time "in *warning* people off." The "findings of fact" by the Register and Receiver and those by the Department being identical in substance, the allegations that the Department failed to con-
sider said findings of fact by the local officers can have no
80 bearing upon the case.

The fourth and fifth specifications of error allege that the acts of the contestant above set forth, together with his other acts subsequently to his return from Kansas, "were sufficient to defeat

a soldier's declaratory statement filed on September 19, 1893." The sixth specification alleges that it was sufficient excuse for contestant's wife and son not coming upon the land from September 16 to September 20 (when they were a few yards distant therefrom upon an adjacent quarter-section,) "that the grass was recently burned, and the ashes were blowing to such an extent that it was impossible for them to remain there." The seventh, eighth and ninth specifications contend that contestant's illness was sufficient excuse for his not returning from Kansas to the land at an earlier date. All the matters above referred to were considered in arriving at the decision heretofore rendered; and nothing is presented in the motion that convinces the Department that the conclusion reached relative thereto was erroneous.

The tenth allegation is that the Department erred "in finding that his" (Coate's) "return on the 22nd day of October was due to his receiving notice of the claim of the defendant." The contestant's testimony on this point is as follows:

From the 20th of September I was sick and traveling on the road; I was disabled to get back until I think the 17th of October, and I started back; I heard he had declared on my land; got it by mail, *and I started.*

Q. You don't mean to say that is the reason you started back to your land?

A. I was sick and hardly able to come.

Q. And that was the reason you started back?

A. No sir.

Even if it were to be conceded that the decision heretofore rendered was in error in finding that Coate's return in October
81 was due to the fact that he had received information that a soldier had filed on the land, it would not necessarily follow that Coate's acts in connection with the land prior to September 19th were sufficient to defeat Greenameyer's filing of that date.

The eleventh allegation refers to "the dimensions of the excavation" made by Coate on the 16th of September. The decision rendered adopts his own statement and if some of his other witnesses testify to a less depth, the Department, in accepting his statement, can not be considered (as this specification alleges) as "construing the evidence against the defendant unfairly and to his prejudice".

The twelfth specification alleges that the decision heretofore rendered was in error in stating that Coate's testimony "seems to lack candor, and there is a perceptible attempt to glide over the pointed questions submitted upon cross examination, and to evade a direct and positive answer."

It would be difficult to quote from the testimony extracts that would appear to warrant the conclusion thus expressed. But even if it were to be conceded that such conclusion was erroneous, it would not prove that Coate's acts in connection with the land prior to September 19, 1893, constituted such a legal settlement *was* would defeat Greenameyer's filing.

The thirteenth allegation is that the Department erred in holding that, "for his failure to perform some substantial acts of settlement

during the days that intervened between his alleged settlement and the filing of Greenameyer" Coate "offers no sufficient excuse, in fact none at all," when in fact he offered the excuse that, "on account of high winds and the flying ashes it was impossible to perform other acts."

82 Counsel for contestant here connects certain facts which the contestant did not so connect in his testimony. When asked why his wife slept on an adjoining claim instead of on the land in controversy, he answered,

It was for the convenience of the women, my wife had a lady friend with her; Mr. Day fixed a place for them to cook down in the creek bottom on his claim.

Q. Why did you remain down on the creek half of the time when you was claiming a tract of land?

A. I told you it was for the convenience of the women folks to do the cooking; so desperate windy and dusty, they went down there in the bed of the creek; Mr. Day took a wagon-sheet, and made a protection down in the channel of the creek for them.

Mr. Coate elsewhere gives his reason for not having made *a* greater improvements on his land before September 20.

Q. What mark of settlement did you leave on the land when you left it on September 20?

A. I had nothing but the well started, and my stake, was all I could leave, *had no tools*, of course.

According to his own account, it was lack of tools that led him to leave his claim with no token of settlement upon it except a hole between a foot and two feet deep and return to his home in Kansas. Every village in Oklahoma was stocked up with farming tools in anticipation of their being needed to make improvements after the opening, and it would seem that a man who had within a month previously sold a farm of 180 acres (even though subject to mortgage), and who was at the time of the opening the owner of "four head of horses, two cows, 125 chickens, 100 bushels of corn, a ton and a half of hay," and considerable other property, might have procured *on* Oklahoma, if he could not bring from his former home, the tools with which to make more improvements.

83 The motion presents nothing that convinces the Department that its decision heretofore rendered was erroneous.

The motion for review is therefore denied, and herewith transmitted for the files of your office.

Very respectfully, C. N. BLISS, *Secretary.*

E. R. B.

84 EXHIBIT "E."

United States Land Office, Perry, Okla., August 31, 1899.

ISAAC C. COATE
vs.
JOHN R. GREENAMEYER.

Involving N. W. ¼ Sec. 18, Tp. 26 N., R. 2 East, I. M.

Decision of Register and Receiver.

On September 19, 1893, John R. Greenameyer filed soldier's declaratory statement for lots 1 & 2 and E. ½ of the N. W. ¼, Sec. 18, Tp. 26, N. R., 2 East, I. M. Perry, land district.

November 24, of the same year I. C. Coates made homestead entry of said tract of land.

March 8, 1894, John R. Greenameyer made homestead *in* pursuant to his declaratory statement hereinbefore referred to.

March 28, 1894, I. C. Coates instituted contest against the said entry of the defendant Greenameyer, alleging priority of settlement on the land and fixing the date of said settlement as the 16th of September, 1893, and further alleging in said affidavit to contest the failure of Greenamyer to comply with the requirements of the homestead law as to residence. A hearing was had upon said contest at the local office at Perry, O. T., and a decision rendered therein in favor of the contestant I. C. Coate. Defendant Greenamyer thereafter and in due time appealed to the Commissioner of the General Land Office, and a decision was rendered in said cause in favor of defendant Greenameyer. Contestant I. C. Coates thereafter and in due time appealed said case to the Secretary of the Interior and the decision of the Hon. Commissioner was affirmed. Contestant thereafter and in due time filed a motion for review of said decision, and the same was denied by the Secretary. Contestant thereafter filed petition for rereview and petition for rehearing on the ground of newly discovered evidence, which petition for review was by the Department considered and the same was
85 denied, and which petition for rehearing was by the Department considered and sustained, and by letter of February 7, 1899, this cause was remanded to the local office at Perry, O. T., with the following directions,

"Order a hearing at which both parties will be allowed to present such further testimony as they may desire, bearing upon the issues of priority of settlement and compliance of the laws as to cultivation, improvements and residence by the parties, respect*fu*lly. After said hearing the local officers will render a decision in the case in accordance with the evidence submitted at such new hearing, considered in connection with that already in the case."

One of the main questions to be determined in this case is whether or not the contestant Coates' *settlement* was sufficient to segregate

the said land before September 19, 1893, the day the defendant *Greenameyer* filed a soldier's declaratory statement for the land. The additional evidence taken is quite conflicting as to the amount of the improvements placed on the land by Coate before the rights of the defendant attached under his declaratory statement. The contestant shows by Chas. S. Coate, W. G. Wainscott Johnson Lewis, A. W. Hartshorne, W. O. Hartshorne, W. P. White and by the deposition of Sanders that Coate was on the land and claiming it as a homestead before September 19. Most of the above named witnesses saw the flag and the well that had been commenced by him before that time, and saw his bedding on the land near the northeast corner of the land. White states that he did some plowing for the contestant on the land between October 7 and 15, 1893, contestant returned to his old home in Kansas, starting September 20, 1893. He returned in October 1893, and built a small house on this land 10 by 10 feet, put a stove in the house, and put some household goods in it; set out a few fruit trees the same month.

86 Draper, Mr. and Mrs. Anglemyer, saw him putting out fruit trees the last of October, 1893. Soon after this contestant returned to Kansas where he remained until February, 1894, when he returned to this land and built a larger and better house.

It is shown by several of the witnesses and by Dr. Crawford that the contestant was thrown out of his buggy in April, 1893, and injured; that the said doctor discharged him May 30, 1893; it is, however, shown by other witnesses that his health was bad during the winter and before his return to the land, that on his return in February he was unable to make the trip overland and came back on the train; that he has resided continually from that time to the present on the land in controversy and has substantial and valuable improvements thereon.

In the old record we find that Francis M. Day, Geo. B. Day and J. R. Seay saw Coate on the land on September 16, 1893; G. B. Sipes saw him on the land September 18, 1893, and J. H. Anderson saw a hole and flag on the land near the northeast corner on September 17, 1893.

Defendant has shown that he filed his soldier's declaratory statement on September 19, 1893, by the deposition of Ed Marshall and Chas. Hatfield and Snyder, and testimony of M. H. Snyder, J. C. Snyder, H. A. Crouse, Morris and Hill, that they were on the land on September 16, to September 20, 1893, and saw no well commenced by Coate and saw no flag where Coate claims to have placed it.

In the old record we find that Thos. W. Hambrick saw no hole when on the land the third Sunday after the opening. Bartlett Pegg fenced the land for Greenameyer in December, 1893, saw no improvements except some breaking. Martin Toomen saw no hole at the northeast corner of the land on September 18, 1893.

Robinson, the county surveyor, of Kay County, surveyed the north

line of the land in controversy since this trial was commenced
87 at the request of the defendant; that contestant had no notice as required by law and was not present. His survey places Coate's improvements on the section north. He claims that his survey was made by and in accordance with the Government field notes; that he found the bearing tree at the north west corner of the section; in which the land in controversy is located; that the two county surveyors who were his predecessors in office ran the north line of the land in controversy north of Coate's improvements leaving them on the land in question.

The defendant admits that the old line was considered by himself as the true line after the Robinson survey.

Defendant shows that he has resided on the land in controversy since the former trial and now has a house 16 x 18 feet and an addition 10 x 10 feet, a well, barn, stable, granary, cave, buggy shed 6 x 10 feet, hog, and cattle lots, 45 acres plowed and 35 acres of hay land.

From this conflicting testimony we find that the preponderance of it shows,

First. That the contestant settled on the land in controversy on the afternoon of September 16, 1893, that he put up a flag and commenced a well; that he remained thereon until the 20th of September, 1893; that he returned in October, 1893, and built a small house, put up a few trees and had some breaking done; that he again went to Kansas in November, 1893, and remained there until February, 1894, when he again returned to the land in controversy and built a larger and better house; that he has resided improved and cultivated part of the said land from that time to the present; that he has substantially complied with all the requirements of the homestead law.

Second. We find that his absence from the land from November, 1893, to February, 1894, was excusable because of his financial and physical condition.
88

Third. We find that the Robinson survey in no wise binds the contestant, because he had no notice and because the two county surveyors before him had run the north line of the land in controversy and both the contestant and the defendant have recognized that line and placed their improvements accordingly; the county officials have also recognized that line and built bridges accordingly.

Fourth. We find that there was no fraud in conveying the land formerly owned by the contestant to his son-in-law some months before the opening of the country to settlement.

Fifth. That the settlement rights of the contestant were commenced before the defendant filed his soldier's declaratory statement, and that the said rights so acquired have been followed up as required by law.

In view of these findings which we believe are supported by the preponderance of the evidence we feel constrained to recommend that the homestead entry of the defendant John R. Greenamyer be

cancelled and that the entry of contestant Isaac C. Coate, be permitted to stand.

Thirty days given for appeal.

ALFRED H. BOLES, *Register.*
JOLL R. SCOTT, *Receiver.*

We accept service of a true copy of the above and foregoing decision in the case of Isaac C. Coate, *vs.* John R. Greenameyer this 31 day of August, 1899.

____ ____,
Att'y for Contestant, Coate.

____ ____,
Att'y for Defendant, Greenamyer.

89 EXHIBIT "F."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *January* 15, 1900.

ISAAC C. COATES
vs.
JOHN GREENAMYER.

Involving Lots 1 and 2 and E. ½ N. W. ¼ Sec. 18, Tp. 26 N., R. 2 East.

Register and Receiver, Perry, Oklahoma.

GENTLEMEN: On September 19, 1893, John Greenamyer filed S. D. S. No. 53, for lots 1 and 2 and E. ½ N. W. ¼ Sec. 18, Tp. 26, N., R. 2 E.

On November 24, 1893, Isaac C. Coate made homestead entry N. 4447, for the same land, but did not allege settlement prior to Greenameyer's filing.

On March 8, 1894, Greenameyer made homestead entry No. 5588, pursuant to his said declaration: and on March 28, 1894, Coate initiated contest against said entry alleging settlement on September 16, 1893, and by reason of such settlement he had prior right to said land.

On May 1, 1894, he filed a supplemental affidavit charging that Greenamyer had failed to establish residence within six months from the date of filing his declaratory statement, and that he had failed to settle upon, cultivate or maintain his residence thereon as required by law.

Pursuant to notice a hearing was had in October, 1895, and on October 24, 1895, you rendered joint decision recommending the cancellation of Greenamyer's entry, and that Coate's entry remain intact.

Greenamyer appealed and on July 25, 1896, this office reversed the decision of your office.

90 Coate appealed from said decision and on June 21, 1898, the Secretary affirmed the decision of this office.

Thereupon Coate filed a motion for review, which was denied by the Secretary. But afterwards, to wit: on February 27, 1899, upon a petition for review, and petition for a rehearing on the ground of newly discovered evidence, it was deemed by the Department that same is sufficient to justify a further hearing in the case, on the issues of priority of settlement, and compliance with the law as to cultivation, improvements and residence, by the parties respectively; and this office was instructed to direct the local officers to order a hearing, at which both parties would be allowed to present such further testimony as they desired, bearing upon the issues of priority settlement, compliance with the law as to cultivation, improvements and residence by the respective parties.

Pursuant thereto a hearing was ordered and had, both parties being present with counsel.

On August 31, 1899, you found from the preponderance of the evidence submitted;

First. That the contestant settled on the land in controversy on the afternoon of September 16, 1893, that he put up a flag and commenced a well; that he remained thereon until the 20th of September, 1893; that he returned in October, 1893, and built a small house, put out some trees and had come breaking done; that he again went to Kansas in November, 1893, and remained there until February, 1894; when he again returned to the land in controversy and built a larger and better house; that he has resided, improved and cultivated a part of the land from that till the present; that he had substantially complied with all of the requirements of the homestead law.

91 Second. We find that his absence from the land from November, 1893, to February, 1894, was excusable, because of his financial and physical condition.

Third. We find that the Robinson survey in no way binds the contestant, because he had no motive and because the two county surveyors before him had run the north line of the land in controversy and both the contestant and the defendant have recognized the line and placed their improvements accordingly; the county officials have also recognized the line and built bridges accordingly.

Fourth. We find that there was no fraud in conveying the land formerly owned by the contestant to his son-in-law, some months before the opening of the country to settlement.

Fifth. That the settlement rights of the contestant were commenced before the defendant filed his soldier's declaratory statement and that the said rights acquired have been followed up as required by law.

In view of these findings which we believe are supported by the preponderance of the evidence, we feel constrained to recommend that the homestead entry of the defendant, John B. Greenamyer, be cancelled and that the entry of contestant Issac C. Coate, be permitted to stand.

On September 28, 1899, Greenamyer filed his appeal from said

decision, assigning twenty-seven grounds of error, the most important of which are the first and second assignments, to wit:

First. That the Hon. Register and Receiver erred in failing to affirmatively find that Isaac C. Coate had failed to show upon this rehearing that he performed any other or different act or acts of settlement upon this tract, than those he presented upon the original hearing of this cause.

Second. Error in not holding upon the aforesaid finding that the law of this case was laid down by the decision of the department herein, was applicable and controlling upon the issues of this
92 case, viz:

If it should be conceded that everything claimed to have been done by Coate in the way of settlement was true, his said acts would not, in the judgment of this Department, constitute him a *bona fide* settler prior to the 19th day of September, 1893, when the defendant made his declaratory statement of record.

It appears from the testimony on behalf of Coate, that he made the race on September 16, 1893, on the running gears of a two horse wagon; that he reached and staked the land about one o'clock and thirty or forty minutes P. M. on that day.

It appears from the testimony of the plaintiff and B. F. Sanders, James Yoeman, Charles C. Coate, and W. P. White, that on the evening of September 16, 1893, plaintiff commenced digging a well and dug the same about two spades and two and a half feet in diameter; that this hole was dug near the northeast corner of the tract.

Johnson Lewis and W. G. Wainscott, testifies to seeing a hole on the northeast corner of the tract, on Sunday morning, September 17, 1893; that they saw Coate there claiming the land. Wainscott states that he saw a flag and brush at the corner.

J. H. Lane, County clerk, testifies that a few days after the opening he crossed over this land and saw a hole near the northeast corner of the tract and he also saw Coate there claiming the land; that about forty days after the opening, he again saw Coate on the tract setting out fruit trees.

Harrison Midkiff states that he saw the land in October, 1893, and Coate had started a well.

In October, 1893, Joseph Anglemyer and Lidia Anglemyer, in passing saw Coate setting out fruit trees on the land.

Annie M. Coate, wife of the contestant, and another witness arrived at the tract on Monday morning September 18, 1893,
93 state that the well had been commenced near the northeast corner before they came there. Mrs. Mary B. Garland, Coate's widowed daughter, who returned to the land with her father in February 1894, states that a well had been commenced near the northeast corner of the tract, and it was afterwards completed.

It is clearly proved that Coate completed the well which is twenty three feet deep and furnished an abundance of good water.

Coate remained on the land until September 20, 1893, when he returned to his former home in Morris County, Kansas, for the purpose of bringing teams, farming implements, and household goods to the homestead, but on account of his illness, he was not able to re-

turn before the middle of October, 1893, at which time he returned and built a small house 10 by 10 feet, covered first with lumber, then with tar paper and shingles on the paper.

He furnished the house with a cooking stove, and cooking implements and bedding. During his absence in Kansas he had some of the land broken, according to arrangements he had made before he went away.

In October, 1893, he set out about fifty fruit trees and did other work on the land. He again returned to his home in Kansas and in February, 1894, he returned to his homestead bringing with him all his personal effects including household goods, stock, grain, hay and his family. He has resided on the tract ever since and has the following improvements thereon, to wit: eighty acres under cultivation, a three roomed house, the main house two room, fourteen feet by sixteen feet, plastered, five hundred fruit trees, blackberries, raspberries, a blacksmith shop, fourteen by twenty feet, a buggy shed, ten by sixteen feet, a hen house, ten — square, a granary 10 x 16 feet, a hen house 10 feet square, a Kansas stable fo- six horses, a corral and feed lot, two caves and a good well twenty-three
94 feet deep, all of the land in his possession is under fence, and he has cultivated the tract each year since and including the year 1894.

On behalf of the defendant, Charles H. Hatfield testifies that he made the race on the day of the opening and settled on the land involved; that if Coate had been on the land he would have seen him and his flag; that there was no flag or well near the northeast corner of the tract; that he was there from four minutes after one o'clock that evening till sun set, and was at the northeast corner looking for the corner stone, and examined every part carefully.

E. D. Marshall states that he became acquainted with the land on September 20, 1893; that he watched the defendant's claim for him from September 20, 1893, until he came and took possession of it; that he was over the tract several times, but he never saw any flag staff or well at any time; that the first improvements he saw on the tract put there by Coate, was his shack and six furrows, about the middle of October, 1893.

M. H. Snyder, testifies that he was first on the tract Tuesday after the opening; that there was no well started near the northeast corner, nor any improvements there; that Coate first came there about October 20, 1893, and put up a "little building shack," and Mr. White, "plowed a little piece of ground;" that he cannot say that Coate did not settle there on the evening of the opening; that he does not know whether Coate spent Saturday, Sunday, Monday, Tuesday and a part of Wednesday on the land.

He thinks that a spade had been used to throw up some dirt against the corner stone. J. C. Snyder helped to do some surveying in the fall of 1893, and passed the notheast corner of the tract several times, he did not see a hole three feet across and two spades deep, but did see where "a little dirt had been thrown out, and some placed about the northeast corner," shoveling had been
95 done after the opening, hole was about ten inches square and eight or ten inches deep.

H. A. Crouse helped survey the land between Greenameyer and Mr. Day's claim, but he did not see, near the northeast corner a hole started for a well, nor did he see any brush stone nor "digging around there."

Hamlin Morris states that he was at the northeast corner of the tract between one and two o'clock on Sunday, September 17, 1893, for the purpose of locating the corner, but he did not see any sign of a well having been commenced.

Roy Greenameyer was first on the land in April, 1894, but he did not see any "digging there at that time." John T. Hill testifies to seeing two or three holes near the northeast corner and saw that somebody had set up brush at the corner, and dirt had been thrown up against the brush; that the holes he saw were not larger than a water bucket.

J. R. Greenamyer, the defendant, testifies as to his improvements which consist of the eighty acres he has in possession all under fence, a good dwelling, a well, a barn, granary, cow shed, wagon shed, buggy shed, hog pen, corral, a dugout, a spring, some cherry and shade trees, that there was no person on the land September 20, 1893, and all he found there was a white flag with the name of Hatfield on it; that he first met Coate the latter part of October or first of November, 1893, at his shack on the land; that he did not go down to the northeast corner until, he saw Coate there; that Coate said he settled on September 16, 1893, Greenamyer established residence in March, 1894.

The foregoing is substantially all the testimony in reference to settlement, residence and cultivation. Both parties have complied with the law since they respectively established residence.

96 It is clear from the preponderance of the evidence submitted, that Coate settled on and staked the land in controversy on the afternoon of Saturday —— 16, 1893, that afterwards and on the same day, he commenced digging a well near the northeast corner of the tract, and the same was completed in the spring of 1894, that his settlement was prior to defendant's settlement, and also prior to the filing of his declaratory statement, that on or about October 21, 1893, Coate built a small house on the tract and set out fruit trees on the tract in ground he had plowed; that he established residence on the land, with his family in February, 1894; and that he has continually resided there ever since, cultivating and improving the land.

It appears that defendant never saw the land until the next day after he had filed his declaratory statement; that the next time he saw the tract was in October, 1893, at which time he saw Coate at his small house on the land, and Coate told him that he, Coate, settled on the tract September 16, 1893, that he was not at or near the north east corner of the tract until he was there in October, or first of November, 1893, but he claims that he was in plain view of the corner when he got on the "raise."

Replying to the question: "How close were you to the northeast corner at that time?" Answered: "Well I wasn't over nearer than half way on the lane, where I crossed from the ridge, or high place

of ground there, running from the southeast corner angling and going on the north about half way between the corner stone making a little east of half way of the raise of land there."

From defendant's own statement he could not have been nearer than one hundred rods to the northeast corner of the tract, and probably not so near. It hereinbefore appears from some of defendant's witnesses, that there was a hole dug near that corner and dirt had been thrown up against the northeast corner.

97 There is nothing in the evidence tending to show that Coate did not intend to make his home on the land from the moment he staked the tract and placed his flag thereon, but it does appear that he intended to make it his home.

The defendant was on the witness stand twice at the rehearing of the case, and his testimony is silent as to the improvements at or near the northeast corner of the tract.

This office fully concurs in your finding of facts as hereinbefore set out in this decision.

Your decision is, therefore, affirmed and defendant's homestead entry No. 5588 is held for cancellation, subject to the right of appeal.

You will so notify the parties.

Respectfully, BINGER HERMANN,
Commissioner.

98 EXHIBIT "G."

27-733. DEPARTMENT OF THE INTERIOR, A. S. T.
W. V. D. WASHINGTON, *July* 3, 1900. V. B.

ISAAC C. COATE
vs.
JOHN R. GREENAMEYER.

Contested Homestead Entry.

The Commissioner of the General Land Office.

SIR: On September 19, 1893, John R. Greenameyer filed soldier's declaratory statement for lots 1 and 2, and the "½ of the N. W. ¼ of Sec. 18, T. 26 N., R. 2 E., I. M., Perry land district, Oklahoma.

On November 24, 1893, I. C. Coate made homestead entry for said tract.

On March 8, 1894, Greenameyer made homestead entry for said tract pursuant to his said declaratory statement.

On March 28, 1894, Coate filed his affidavit of contest against said entry of Greenameyer on the ground of priority of settlement, alleging that he had settled on and claimed said tract on September 16, 1893, and prior to the filing of said declaratory statement by Greenameyer.

A hearing was had at the local land office, both appearing in person and by attorneys and offering testimony. The local officers found in favor of Coate. Greenameyer appealed to your office where a

decision was rendered reversing the action of the local officer and holding Greenameyer's entry intact. Coate appealed from said decision of this Department, where, on June 21, 1898, a decision
99 was rendered affirming said decision of your office. Coate filed a motion for review which was denied by this Department on October 5, 1898.

On November 5, 1898, Coate filed a petition for re-review but before action was taken thereon he filed a petition praying that in case his petition for re-review should be denied he be allowed a rehearing in said case. By departmental letter of December 13, 1898, said petition for rehearing was entertained on the usual conditions as to service on the opposite party, etc. Service was duly had and proper returns made to this Department, where, on February 7, 1899, on consideration of said petition, the same was granted and a rehearing was directed at which both parties should "be allowed to present such further testimony as they may desire, bearing upon these issues (priority of settlement and compliance with the law as to cultivation, improvement and residence by the parties respectively). Said petition for re-review was at the same time denied.

A rehearing was accordingly had before the local officers, both parties appearing in person and by attorneys and each offering additional evidence, and on August 31, 1899, the local officers found the issues in favor of Coate and recommended the cancellation of Greenameyer's entry. Greenameyer appealed to your office, where, on January 15, 1900, a decision was rendered affirming the action of the local officers, and holding Greenameyer's entry for cancellation, and from that decision Greenameyer has appealed to this Department.

In said departmental decision of June 21, 1898, it was said that—

If it should be conceded that everything claimed to have been done by Coate in the way of settlement was true, his said acts
100 would not, in the judgment of this Department, constitute him a *bona fide* settler prior to the 19th of September, 1893, when the defendant made his declaratory statement of record.

It is now insisted on behalf of Greenameyer, first, that said language in said decision amounts to an adjudication by this department to the effect that Coate's acts of settlement were not sufficient under the law to give priority to his claim over Greenameyer's declaratory statement, and that inasmuch as Coate, at the rehearing failed to prove any acts of settlement in addition to those claimed by him at the original hearing, that therefore the question of the legality and sufficiency of Coate's settlement is *res adjudicata* and can not again be considered and passed upon by this Department; second, that Coate staked, claimed and camped on another tract of land on the day of the opening, and that his alleged acts of settlement on the tract were performed while he was actually camping on, claiming and holding a different tract; third, that Coate's initial acts of settlement alleged to have been upon this tract, were in fact upon a different tract and not on the land in

controversy; fourth, that Coate was not qualified to make entry for the land on the day of the opening because he was then the owner of more than 160 acres of land in the State of Kansas; fifth, that the rule as to the sufficiency of acts of settlement on Oklahoma lands as announced in the case of Hurt *v.* Giffin (17 L. D., 162) is not applicable in this case, this not being a contest between two claimants both of whom made the race on the day of the opening, but between one such claimant and one who claims under a subsequent filing and not under a settlement made on the day of the opening; that Coate failed to establish residence on the land within a reasonable time and that his alleged sickness was not a sufficient excuse for such failure. Counsel for Greenameyer complains
101 that he has not heretofore been able to get decisions on these various points and insists that they be now separately considered and decided by this department, and it is contended that if a single one of the six questions above enumerated shall be decided in accordance with Greenameyer's contention, such decision will entitle him to the land in controversy.

As to the first point, viz: that by said decision of June 21, 1898, the question as to the sufficiency of Coate's acts of settlement became *res adjudicata,* it is sufficient to say that the doctrine of *res adjudicata* is not applicable to this case for the reason that this is not a new action involving the questions and subject matter of a former suit between the same parties in which a court of competent jurisdiction has rendered a judgment which has become final; but it is merely the continuation of a pending action, and to say that this Department cannot in this proceeding reconsider a question already passed upon in the progress of the cause, would be equivalent to saying that it has no authority to set aside its own judgment and grant a new hearing.

As to the second point raised by counsel for Greenameyer, viz., that Coate on the day of the opening staked, claimed, camped upon and held a tract of land different from the one in controversy, it is not believed that said contention is sustained by the proof, as will hereinafter more fully appear.

It is shown by the proof that according to a recent survey of the north boundary line of the land in controversy, made by the county surveyor at the instance of Greenameyer beginning at the corner located by means of a recently discovered witness tree, supposed to have been designated and marked as such by the government surveyor in the original survey of the land, that said north boundary line passes a short distance south of the point at which Coate claims to have made his settlement on the day of the opening, and shows said point to be on the tract of land immediately north of the
102 tract in controversy and it is insisted that Coate's alleged settlement was not on the land in question and therefore gave him no right to claim the same.

Coate's settlement was made a short distance south west of a certain corner stone which was pointed out to him on the day of the opening, and was well known in the community, and universally recognized as the northeast corner of the land in controversy. The

line in question is a line between two sections and it was so well understood to be the point indicated by said corner stone, that the public authorities in establishing roads recognized that as the proper and true location of said road and established the public road between said two sections on it and built public bridges on said road so located, both east and west of said stone corner, and said road and bridges are still so located. Persons claiming lands a considerable distance from that point, in establishing their lines, began their surveys at said corner stone, and Greenameyer himself recognized it as the northeast corner of the land in controversy and built his fences accordingly, and even if it were conclusiveiy shown that both parties, as well as the general public, have all the while been mistaken as to the exact location of said line, under the circumstances of this case the discovery of such a mistake would neither add to the validity of the claim of one nor detract from that of the other. If it were found to be doubtful whether or not both parties were mistaken as to the location of said line, still there can be no doubt as to the fact that they were both claiming the tract of land in controversy in this case. If it were a case where two settlers had differed in opinion as to the location of a line, one claiming it to be in one place and the other insisting that it was in a different place, and they had made their settlements and improvements accordingly, then justice would say that the one whose judgment was
103 shown to be correct should not suffer loss because of the mistaken opinion of the other, but this is no such case. It is by no means certain that said corner stone is not the true northeast corner of said tract, and it is clearly shown that it had been universally so recognized by all interested parties including Greenamyer, and it would be unjust to hold that Coate should suffer loss because he acted upon the opinion prevalent in the community and acquiesced in by Greenameyer, as to the location of said line and corner and made his improvements accordingly there being no doubt as to his claiming the tract of land involved in this contest.

As to the question that Coate was not, at the time of the opening, qualified to make entry for the land because he was then the owner of more than 160 acres of land in Kansas, the proof fails to show that such was the case. It appears that he had previously owned 180 acres of land in Morris County, Kansas, which was under mortgage to secure a debt about equal to the land, and that some time before the opening of the land in controversy to settlement he conveyed said Kansas land to his son-in-law, Medkiff, by quitclaim deed, subject to said mortgage debt, which was subsequently paid by Medkiff. Coate remained on the place some time after the execution of the deed, but it is not shown that he exercised any act of ownership over the land or ever afterward pretended to claim it. It was rented out by Medkiff who collected the rents and Coate is not shown to have had anything to do with the renting or sale of it.

It appears that there was also a mortgage on some of Coate's personal property and that it was paid off by Medkiff either out of the proceeds of the rent or the sale of the Kansas land, and it is argued that Medkiff was acting in the capacity of trustee or agent

for Coate in the renting and selling of the land. The deed
104 from Coate to Medkiff is not in the record and it is only stated to have been a quit-claim deed, whereby Coate conveyed to Medkiff all the interest he had in the land. It is not shown that any trust was created by said deed or that Coate retained any interest in the land, or in any manner restricted Medkiff in the management and disposition of the property or interest conveyed to him by the deed. It cannot, therefore, be held that Coate was, at the time of the opening, the owner of the Kansas land and therefore disqualified from making entry for the land in question.

If it be granted that the rule announced in the case of Hurt *v.* Giffin, *supra*, as to the sufficiency of acts of settlement on Oklahoma lands, does not apply to this case because this is not a contest as to priority of settlement between two parties whose claims depend upon priority of initial acts of settlement, then the question is whether or not Coate's acts of settlement performed prior to the filing of Greenameyer's declaratory statement, were such as to give reasonable notice that he claimed the land; not whether Greenameyer *had* knowledge of it, but whether Coate's acts were such that by proper diligence *he might have had* such knowledge. Upon this point the testimony will be hereinafter considered, and also the testimony whether or not Coate's residence on the land was established in due time.

The proof shows that Coate made the race on the day of the opening (September 16, 1893), from the Kansas State line, on the running gears of a wagon drawn by two horses. He first stopped and was about to put up his stake on the tract immediately east of the land in controversy, but finding another man already there and claiming that tract, he immediately passed on to this tract which he reached about twenty minutes after one o'clock, p. m. He at once put up a stake about four or five feet high on which was a flag made of red flannel cloth. This stake and flag stood from 50 to
105 100 yards southwest of the corner stone hereinbefore referred to as the northeast corner of the land in question and remained there till some time before Greenameyer made his filing. Having erected the stake and flag, Coate commenced, on the same afternoon, to dig a well about 45 feet south of said corner stone and about 12 feet west of the east line of the land. He seems to have been in rather feeble health, having been recently recovered from an attack of pneumonia superinduced by an injury received by being thrown from a buggy. He had nothing but a spade with which to dig, but by the aid of his boy who had accompanied him in the race, he succeeded that afternoon in digging the well to the depth of about 18 inches, it being about 3 feet in diameter. The dirt thrown from the well was thrown up beside the well. He slept that night on the land near his well, his bed being on the ground between the hind wheels of the wagon.

On Sunday morning, September 17, his son took the team and wagon and returned to the Kansas State line after his mother and a lady friend of hers who had accompanied them to that point, and also to bring to the claim some provisions which had been left at

the State line. Coate remained on the land Sunday and warned others off. The boy did not return with the wagon and team till Monday morning, September 18, having missed the way on his return from the State line.

Coate slept in the same place on the land again on Sunday night. On the forenoon of Monday, the 18th of September, the boy returned to the claim with the team and wagon, the provisions, his mother and her lady friend. The prairie grass had been recently burned off, a high wind was blowing and the dust and ashes from the recently burnt grass made it very uncomfortable for the ladies in the open prairie. There was a creek passing through the
103 tract of land immediately east of the land in controversy. This tract had been settled upon by a man named Day, and he seeing the uncomfortable situation of the ladies in the open prairie, invited them to camp down in the creek bottom on his land, where they would be somewhat protected from the wind. They accepted his invitation the wagon with the provisions was driven down into the creek bottom on Day's claim, and he (Day) put up at that place a wagon cover for a sort of shelter for them under which they could do their cooking. They (the ladies and the boy) with the team and wagon remained at this camp, cooking and eating there and sleeping in the wagon from Monday, the 18th till Wednesday, the 20th, of September. This camp was ten or twelve rods from where Coate had started his well and had his bed, and he ate his meals at the camp, but continued to sleep on his own claim at the same place where he first made his bed. On Wednesday, September 20, 1893, Coate and the entire party left for his former home in Kansas, for the purpose of bringing to his claim plows and other tools with which to improve the place. It was about 150 miles from the land in controversy to his former home in Kansas. When they had reached a point within forty miles from their destination, and while they were in camp in the night, they were overtaken by a flood caused by a water spout and barely escaped by wading through the water to higher ground. Coate became sick from this exposure and was sick when he reached his former home on September 25, 1893, and in consequence of said sickness was detained there till October 17, 1893, when he started back to his claim where he arrived again on October 22, bringing his team, wagon, plow, provisions, bedding, etc., and his family except one boy who was left behind to attend to some stock which was left in Kansas.

It should be remarked that on leaving the claim on September 20, Coate employed one of his neighbors to do some plowing on
107 the claim, which was done during his absence. Immediately after his arrival on October 22, he began the erection of a small house in which to live on the land, and as soon as it was built, which was within a few days, he moved his bedding, etc., and his family into it. He also did some work on his well and broke about two acres of the land on which he set out an orchard of fruit trees, nearly all of which are still living. His wife and boy remained on the land at that time about a week, when they returned to Kansas, but he remained on the land, living in said house till November

27, when he again left for Kansas to bring the remainder of his property to the claim, but before leaving he employed a neighbor to look after his house and the property, which he left in it. He was again detained in Kansas by sickness and did not get back to the claim till February 10, 1894, when he brought his entire family and everything he possessed. The wagons conveying his property were driven immediately to the house he had built and in which he had been living, and a portion, at least of said property was unloaded there, but the house, being only about ten feet square, was too small to contain it all or to accommodate the entire family. A severe blizzard was prevailing at the time and after the family had eaten dinner at said house, Coate and his wife, upon the invitation of a neighbor named Hill, went to his house taking with them some provisions, and they remained there, cooking and eating their own provisions, for several days while an addition was being built to the small house on the claim. This was done in a few days, whereupon they moved the remainder of their property into it and lived there ever since. While this addition was being built to the house a portion of Coate's family and some of the men who were working on the house lived in the small house first built. The addition built to the house is 14 feet wide and 26 feet long.

108 Coate has about 50 acres broken, some pasture fenced, a stable, chicken house, orchard, etc. The well which he commenced to dig on the day of the opening and on which he did more work later in the fall of 1893, was finished in the spring of 1894, and affords plenty of good water not only for Coate's use, but also supplies several of his neighbors.

As before stated, it is claimed by Greenameyer that Coate first staked and claimed the land east of this tract and that he was camping upon, claiming and holding said land when he performed his initial acts of settlement on this land.

There is not a syllable of testimony in the record showing that Coate ever thought of claiming the tract east of this land after he was first told on the day of the opening that it was claimed by another man, the proof shows that he went directly onto this tract and put up his stake and began his well, and he has never since claimed this tract and no other. Nor is it true that he camped on the Day claim. His wife, her friend and the boy did camp there two days and nights, but he remained at his first location on the land in controversy where he had his bed all the while and the mere fact that he stepped across the line to eat his meals with his wife and boy, down in the bed of the creek where they were free from the dust and ashes that were flying in the winds, cannot be construed as an abandonment of his claim to this land, nor an attempt to set up a claim on the other tract.

An effort was made by Greenameyer to prove that Coate did not put up the stake and flag and commence the well as he claims to have done on the day of the opening, and several witnesses testified in behalf of Greenameyer that they visited the place where Coate claims to have had these things; that they examined the land in

that vicinity and did not see the stake and flag nor the well,
109 and some of said witnesses swear positively that they (the stake and well) were not there, but in view of the fact that a large — of disinterested witnesses swear that they saw them at the place where Coate claims to have had them; that their attention was claimed to them, some of said witnesses testify that they saw Coate in the act of digging the well, others that they stood near it, looked at it and talked about it, and still others that they stepped down into it, the testimony of those witnesses who say that there at the place might have seen it if it had been there but did not see it, and therefore testify that it was not there, must be considered as merely negative in character and can not be accepted to disprove the fact so positively sworn to by a large number of witnesses. It is therefore found that Coate on the day of the opening erected the stake and flag and commenced the well as claimed by him. The stake was four or five feet high and the flag was of red flannel, well calculated to attract attention. It was placed in a conspicuous place in the open prairie where it might have been seen by any one who came upon that portion of the land, and was seen by a great many persons. The same thing is true as to the well which was commenced in good faith by Coate not only as a token of his setlement but as a permanent improvement on the land. He selected a place where he expected to find good water, and commenced the well with the intention of procuring water for use upon his homestead, and his good faith is demonstrated by the fact that he completed the well in the same place. The stake, flag and well were there in plain view of everybody who came upon that part of the land. Coate himself was there, sleeping by his well, and warning people that he claimed the land on the very day when Greenameyer filed his declaratory statement. It is argued for Greenameyer that

he was deceived and misled by Coate's camp on the Day
110 claim, whereby he — induced to believe that Coate was claiming that land and not the tract in controversy, but the proof shows that he filed his declaratory statement on September 19, 1893, and he admits that at the time he had never seen the land. If he had, before filing his statement gone upon the land to see if there had been any settlement made upon it, he certainly would have seen Coate's improvements and would at least have given Coate an opportunity to have warned him of his settlement as he did others at the same time; but he did not do this but took the chances of filing without knowing who might be upon the land or what improvements might be made there, and having made his filing he made a hurried visit to the land early on the morning of September 20, as he says to see who and what was there. He says he went from Cross, which is about three miles from the land. He started before daylight and got back in time to take a train leaving there at 8:40 a. m. He admits that he spent but a short time on the — and did not go near the northeast corner where Coate had his stake, flag, bed and well, and where he, (Coate) himself probably was at that time, for the proof shows that he did not leave for Kansas till later in the day.

Coate had never, from the time he first reached and staked the

land down to the present, abandoned his purpose to hold it as his homestead. His acts were sufficient to give notice of his claim, and if his residence was not established when he staked, claimed, slept upon and improved it with the intention of making it his home, it certainly was established when he built a house upon it, moved his family and his property into it, set out his orchard and made other improvements necessary and proper for a home, and this must be held to have been done in reasonable time under all the circumstances.

The result is that said departmental decision of June 21, 1898, is hereby recalled and revoked and your said decision of January 15, 1900, is hereby affirmed and Greenameyer's said entry will be cancelled. Said petition and the papers accompanying the same are herewith returned.

111

Very respectfully, E. A. HITCHCOCK, *Secretary.*

E. M. W.

112

EXHIBIT "H."

27-733. S. V. P.

DEPARTMENT OF THE INTERIOR, A. S. T.
WASHINGTON, *August* 30, 1900.

ISAAC C. COATE
vs.
JOHN R. GREENAMEYER.

The Commissioner of the General Land Office.

SIR: John R. Greenameyer has filed his motion for review of departmental decision rendered July 3, 1900 (unreported), in the case of Isaac C. Coate *v.* John R. Greenameyer, involving lots 1 and 2 and the E. ½ of the N. W. ¼ of Sec. 18, T. 26 N., R. 2 E., I. M., Perry land district, Oklahoma, whereby the decision of your office and the action of the local office were affirmed. Coate's entry for said tract held intact and Greenameyer's entry held for cancellation.

The various grounds relied upon in said motion were fully considered and passed upon in said decision and no new matter is brought to the attention of the Department, nor is any sufficient reason shown for disturbing said decision.

Said motion for review is therefore denied, and together with the accompanying papers is herewith returned.

Very respectfully, THOS. RYAN,
Acting Secretary.

E. M. W.
M.

113 EXHIBIT "X."

STATE OF KANSAS, *Morris County, ss:*

Filed for Record This 27 Day of January, A. D. 1894, at 2 P. M.
J. H. Straight, Register of Deeds, by M. E. S.

Isaac C. Coate et al.
to
A. C. Midkiff.

This indenture, made this 30th day of August, A. D. 1893, between Isaac C. Coate and Anna M. Coate, of Morris County, in the State of Kansas, of the first part, and A. C. Midkiff, of Morris County, in the State of Kansas, of the second part:

Witnesseth, That said parties of the first part, in consideration of the sum of *Three Thousand* and no/*L*00 Dollars, the receipt whereof *i*f hereby acknowledged, do by these presents remise, release and quit-claim unto said party of the second part, his heirs and assigns, all the following described real estate, situated in the county of Morris and State of Kansas, to wit: The south half of the northeast quarter of the northwest quarter of the south half of the north half of the northeast quarter, and the south half of the northeast quarter, all in section sixteen (16), Township (17) Range eight, containing in all 180 acres, more or less.

This deed is in fulfillment of a written contract made and entered into between Isaac C. Coate, one of the parties hereto, and the said A. C. Midkiff, party of the second part hereto, for the conveyance of the above described premises.

To have and to hold the same together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining for ever.

In witness whereof the said parties of the first part have hereunto set their hands the day and year first above written.

ISAAC C. COATE.
ANNA M. COATE.

Executed and delivered in the presence of
Witnesses:
E. S. BERTRAM.

114 STATE OF KANSAS, *Morris County, ss:*

Be it remembered that on this 30th day of August, A. D. 1893, before me, the undersigned, a notary public in and for the county and State aforesaid, came Isaac C. Coate and Anna M. Coate, husband and wife, who are personally known to me to be the same persons who executed the within instrument of writing, and such persons duly acknowledged the execution of the same.

In testimony whereof, I have hereunto set my hand and affixed my notary seal, the day and year last above written.

[NOTARIAL SEAL.] E. S. BERTRAM,
Notary Public.

Term expires Sept. 24, 1894.

And thereafter, and on said 5th day of September, 1904, the defendant, Isaac C. Coate, filed his demurrer to plaintiff's said second amended petition, which demurrer reads in words and figures as follows, to wit:

115 In the District Court of Kay County, Oklahoma Territory.

JOHN R. GREENAMEYER, Plaintiff,
vs.
ISAAC COATE, Defendant.

Demurrer.

Comes now the defendant and demurs to the 2nd amended petition of the plaintiff filed herein, for the following reasons, to wit:

First. Because it is not shown in said amended petition wherein the Honorable Secretary of the Interior has misapplied the law to the undisputed facts as established in the various contest proceedings in the Land Tribunals.

Second. It is not shown by the plaintiff's amended petition that fraud was practiced on the plaintiff in this cause in the contest proceedings in the Land Department, whereby he was prevented from exhibiting his case fully to the Land Department.

Third. That the Court has no jurisdiction of the Subject matter of the petition herein, for the reason that the amended petition shows that the Land Tribunal has passed upon all matters and facts alleged in said amended petition.

Fourth. That the said second amended petition does not contain the evidence adduced on the trial on the contest cases in the Land Tribunal.

Fifth. That said amended petition does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant, or to entitle the plaintiff to the relief prayed for.

C. L. PINKHAM AND
CLINE & DUVAL,
Attorneys for Defendant.

Endorsed: No. 2314. John R. Greenameyer, Plaintiff *vs.* Isaac Coate, Defendant. Demurrer to 2nd Amended Petition. Filed Sept. 5, 1904. Jay E. Pickard, Clerk, by E. A. Burke, Deputy. C. L. Pinkham & Cline & Duval, Att'ys, For Def't.

116 And thereafter, and on said 5th day of September, 1904, the following proceedings were had in said case. A copy of the journal entry of which is in the words and figures following, to wit:

In the District Court of Kay County, Oklahoma Territory.

JOHN R. GREENAMEYER, Plaintiff,
vs.
ISAAC C. COATE, Defendant.

Journal Entry.

Now on this 5th day of September, A. D. 1904, this cause came regularly on for a hearing on the demurrer of the defendant to the second amended petition of the plaintiff. The plaintiff appeared by Keith, Matson & Wright and C. W. Ranson, his attorneys, and the defendant appeared by C. L. Pinkham and Cline & Duval, and thereupon plaintiff applies for leave of court to attach the several exhibits to his said petition and such leave is by the court granted.

The court after hearing argument of counsel, and being fully advised in the premises, sustains said demurrer, and the plaintiff by his attorney announced that he elected to stand on his petition. It is therefore, by the Court, considered, ordered and adjudged that the plaintiff take nothing on his cause of action; and that said suit be dismissed at the cost of the plaintiff; to which ruling of the court the plaintiff excepts and his exceptions are by the Court allowed and entered, and thereupon plaintiff asked time to make and serve a case made in said cause for the Supreme Court.

The Court orders that the plaintiff have thirty days to make and serve case-made; the defendant is given ten days to suggest
117 amendments, and the case made to be settled on three days' notice given by either party.

(Signed) BAYARD T. HAINER, *Judge.*

O. K.
C. W. RANSOM,
Attorney for Plaintiff, and
O. K.
C. L. PINKHAM AND
CLINE & DUVAL,
Attorneys for Defendant.

(Endorsed:) 2314. Greenameyer *vs.* Coate. Journal Entry. Filed September 5, 1904. Jay E. Pickard, Clerk by E. A. Burke, Deputy. Filed May 1, 1905, Benj. F. Hegler, Clerk Supreme Court.

118 In the District Court of the Territory of Oklahoma in and for Kay County, Sitting With the Powers of a District Court of the United States Within and for said County and Territory.

JOHN R. GREENAMEYER, Plaintiff,
vs.
ISAAC C. COATE, Defendant.

Certificate of Trial Judge.

I, the undersigned, judge of the above named District Court at the time of the proceedings in the above entitled cause heretofore mentioned, and having presided as such judge at the hearings and proceedings above mentioned, hereby certify that this case is one involving the title of real estate, and is one belonging to the excepted class mentioned in the Oklahoma Statutes pertaining to appeals. And I do hereby authorize and direct and do make this certificate a part of the record of said case, and the same is hereby incorporated in and made a part of the case made therein.

BAYARD T. HAINER,
Judge of the Above-entitled Court.

Attest:
JAY E. PICKARD,
Clerk District Court,
By E. A. BURKE, *Deputy.*
[SEAL.]

Filed May 1, 1905.

BENJ. F. HEGLER,
Clerk Supreme Court.

119 In the District Court of the Territory of Oklahoma in and for Kay County, Sitting With the Powers of a District Court of the United States Within said County and Territory.

JOHN R. GREENAMEYER, Plaintiff,
vs.
ISAAC C. COATE, Defendant.

The above and foregoing Case Made contains a true copy of the petition, demurrers, journal entries, motions and pleadings of every kind and character filed of record in the above entitled case, and all other testimony and evidence offered and introduced in all of the trials and proceedings had therein. It contains a true copy of the judgments, orders, and decisions of the above entitled court and all proceedings and hearings of every kind and character had in the above entitled case, as well as all papers, documents and exhibits filed in said cause. And the certificate of the trial judge, showing the title to real estate involved in said action.

120 In the District Court of the Territory of Oklahoma in and for Kay County, Sitting With the Powers of a District Court of the United States Within said County and Territory.

JOHN R. GREENAMEYER, Plaintiff,
vs.
ISAAC C. COATE, Defendant.

Service of Case-made.

To C. L. Pinkham and Cline & Duval, attorneys for the above-named defendant, and Isaac C. Coate, the above-named defendant:

The foregoing Case Made, in the action above entitled, in the above named District Court of Kay County, Oklahoma, wherein John R. Greenameyer is plaintiff and Isaac C. Coate is defendant, is hereby presented and served upon you as attorneys for the said defendant this 4 day of October, 1904.

KEITH, WRIGHT, AND
C. W. RANSOM,
Att'ys for said Pl'ff, John R. Greenameyer.

Filed May 1, 1905.

BENJ. F. HEGLER,
Clerk Supreme Court.

Service of the foregoing case made, in the above entitled action is hereby acknowledged and accepted this 4 day of October, 1904.

C. L. PINKHAM &
CLINE & DUVAL,
Att'ys for Def't, Isaac C. Coate.

Filed May 1, 1905.

BENJ. F. HEGLER,
Clerk Supreme Court.

121 In the District Court of the Territory of Oklahoma in and for Kay County, Sitting With the Powers of a District Court of the United States, Within said County and Territory.

JOHN R. GREENAMEYER, Plaintiff,
vs.
ISAAC C. COATE, Defendant.

Settlement of Case-made and Certificate of Settlement.

TERRITORY OF OKLAHOMA, *Kay County, ss:*

I, the undersigned Judge of the above entitled District Court of Kay County, Oklahoma, and having been the judge of said court at the time, and having presided as such judge at the above mentioned hearing and proceedings had in the above entitled action,

hereby certify that the foregoing case made contains a true statement of all the pleadings, motions, evidence, orders, findings, proceedings, and judgments had in said cause and same was presented to me as a case made in the action above entitled, by C. W. Ransom, attorney for the above named plaintiff, on the 17th day of Feb'y, 1904, at — o'clock — at Newkirk, Oklahoma Territory, the said plaintiff appearing then and there by C. W. Ransom, his attorney, and the above named defendant appearing by W. S. Cline his attorney, at the settlement hereof, at said time and place and certain amendments suggested by the attorney for said defendant, having been, so far as the same are correct and proper, allowed by me and incorporated in said case made, I now settle, allow and sign same as a true and correct case made, in the above entitled action, and direct that it be attested and filed by the Clerk of the above entitled court.

122 Witness my hand at Newkirk, Kay County, Oklahoma this 17th day of Feb'y, 1905.

BAYARD T. HAINER,
Judge of the Above-entitled District Court.

Attest:
JAY E. PICKARD,
Clerk of the District Court of Kay County, Oklahoma,
By E. A. BURKE, *Deputy.*
[SEAL.]

Filed in the District Court of Kay County, Oklahoma Feb. 17, 1905.

JAY E. PICKARD, *Clerk,*
By E. A. BURKE, *Deputy.*

Filed May 1, 1905.

BENJ. F. HEGLER,
Clerk Supreme Court.

Case made endorsed: No. 1727, Exhibit "A." John R. Greenameyer, Plaintiff in error, *vs.* Isaac C. Coate, Defendant in error. Filed in the District Court of Kay County, Oklahoma, February 17, 1905, Jay E. Pickard, Clerk by E. A. Burke, Deputy. Petition in error and case made. Filed May 1, 1905. Benj. F. Hegler, Clerk Supreme Court.

123 And thereafter, at the June Term, 1905, of said Supreme Court, on the Sixteenth day of June, 1905, the following proceeding was had in said cause, to wit:

1727.

JOHN R. GREENAMEYER, Plaintiff in Error,
vs.
ISAAC C. COATE, Defendant in Error.

Come now Keith & Wright, for plaintiff in error, and W. S. Cline, of counsel for defendant in error, and make oral argument herein. And cause is taken on record, briefs and oral argument.

124 And afterward, at the January, 1907, Term of said Supreme Court, on the Thirteenth day of February, 1907, the following proceeding was had in said cause, to wit:

1727.

JOHN R. GREENAMEYER, Plaintiff in Error,
vs.
ISAAC C. COATE, Defendant in Error.

And now this cause comes on for final decision and determination by the court upon the record and briefs submitted herein.

And the Court having duly considered the same, and being fully advised in the premises, finds: That the judgment of the lower court in this cause should be affirmed, at the cost of plaintiff in error.

It is therefore ordered and adjudged by the Court, that the judgment of the lower court in this cause be and the same is hereby affirmed, at the cost of plaintiff in error.

Opinion by Gillette, J. All the Justices concurring except Hainer, J., who tried the cause below, not sitting, and Pancoast, J., absent.

Which opinion reads in words and figures as follows, to wit:

124½ In the Supreme Court of the Territory of Oklahoma, January Term, 1907.

Filed February 13, 1907.

1727.

JOHN R. GREENAMEYER, Plaintiff in Error,
vs.
ISAAC C. COATE, Defendant in Error.

Syllabus.

1. Title—Holding in Trust.—Decision of Secretary of the Interior. In an action to declare the title to a homestead, a trust for the use and benefit of an adverse claimant, upon the ground that the Secretary of the Interior has misapplied the law to the facts adduced upon a contest trial before the land department, and the evidence upon such trial is not set forth in the petition filed in such action, the facts found by the Secretary of the Interior must be held to be conclusive, as the same are shown by his decision set out in the petition, and his decision based thereon will not be disturbed unless there appears a clear misapplication of the law to such facts.
2. Fraud—Where not Sufficient to Sustain Action.—Where the title to a tract of land is acquired under the homestead law after a contest before the land department with an adverse claimant, such adverse claimant cannot have the title so acquired

adjudged a trust for his use and benefit upon the ground of fraud practiced upon the trial of such contest, where the only fraud stated is the alleged fact that a successful party procured the judgment of the land tribunal upon testimony which the pleader avers is not the truth, and that he was deceived thereby, when a full and complete hearing is shown to have been given the parties. (Following Cagle *v.* Dunham, 14 Ok. 610.)

Error from the District Court of Kay County; Bayard T. Hainer, Trial Judge.

Affirmed.

Keith & Wright, and C. W. Ransom, for Plaintiff in error.
C. L. Pinkham, and Cline & Duval, for Defendant in error.

125 Opinion of the Court by GILLETTE, *J.*:

This action was brought in the District Court of Kay County, by the plaintiff in error against the defendant in error to recover the alleged title to lots 1 and 2 and the east half of the northwest quarter of Section 18, township 26 north, Range 2 east of the Indian Meridian, being land in said county. Said land had been the subject of a contest between the plaintiff and defendant, had been tried and determined by the local and general land office, and upon appeal determined by the Secretary of the Interior in favor of the defendant, who had thereafter acquired the patent title thereto from the government.

The prayer of the petition asks such legal title so vested in defendant be declared a trust for the plaintiff's use and benefit, and that he be declared the owner of said tract of land. A demurrer was filed to plaintiff's petition which was, by the trial court sustained, and the cause comes to this court asking a reversal of the order sustaining such demurrer.

The petition of plaintiff has attached to it the several determinations of the land department from the first determination in the local land office to and including the final judgment of Mr. Secretary Hitchcock, awarding the land to the defendant; but the evidence taken upon the trial in the land office is not brought forward or shown.

The record shows that on June 21, 1898, and October 5, 1898, the cause was determined by the then Secretary of the Interior, C. N. Bliss, the decision of June 21, being a determination of the facts in favor of the plaintiff, and that of October 5, 1898 was
126 a denial of a review, but before the entry of judgment denying such review was had and entered, the defendant filed a petition for a rehearing in said cause, which was granted December 13, 1898. A rehearing was accordingly had, all the parties appearing in person and by attorneys, and on August 31, 1899, the local land office found the issue in favor of the defendant, from which an appeal was had to the general land office, where the decision of the local

office was affirmed, January 5, 1900, and from such decision the case was by appeal again brought before the Secretary of the Interior who affirmed the decision of the general land office and revoked the decision of the Secretary of June 21, 1898.

It thus appears that the local office, the general land office and the Secretary of the Interior have each reached the same conclusion from the testimony submitted upon rehearing, which testimony as stated *in* not set out in plaintiff's petition. We are therefore, wholly unable to determine whether or not the conclusions reached by the Secretary are supported by the testimony in the case. There are certain facts recited in the judgment of the Secretary upon which he bases his conclusions in favor of the defendant, and under the authority of McCalla *v.* Akers, 15 Ok. 52, if the judgment of the Secretary is consistent with his findings the demurrer to the petition was properly sustained.

The record before us shows that the defendant settled on the land in question September 16, 1893, and the plaintiff, Greenameyer, filed on the tract his soldier declaratory statement on September, 19, 1893. The right of the respective parties to the land in the contest which *which* was terminated by the decision of the Secretary of the Interior complained of, turned upon the question as to
127 whether or not the initial acts of the defendant were sufficient to give him a valid homestead right to the land. If so he was plainly first in right in point of time. The decision of the Secretary sets out his going upon the land September 16, 1895, with his son, with the running gears of a wagon and no tools except a spade; the putting up of a stake thereon about five feet high with a red flannel cloth attached and the commencement of a well on the land; his sleeping on the land that night and the sending of his son back to the Kansas line for his mother; his subsequent sleeping on the land and his return to his former Kansas home on the 20th of September, for the purpose of bringing to the claim his plows and other tools with which to improve the place, one hundred and fifty miles distant. The findings show that the defendant was at this time in feeble health by reason of an injury sustained by being thrown from a buggy; that on his way to his former home and within a distance of forty miles thereof, while in camp for the night, he was overtaken by a flood caused by a water spout, and barely escaped by wading through the water to higher ground; from which exposure he became sick and was sick when he reached his former home, September 25th, and in consequence of which sickness he was detained until October 17th, when he started back to his claim, arriving there October 22, 1893, bringing his team, wagon, plow and his family, except one boy who was left behind to attend to his cattle; that when he left the land September 20th to go to his former home for the purposes stated, he employed one of his neighbors to do some plowing on the claim, which was done during his absence. The opinion of the Secretary then set out the subsequent acts of the defendant with reference to the land up to the finishing of his improvements as the
128 same were constructed in the winter of 1893, and spring of 1894, the bringing of the balance of his personal property to

the land, the building of additions to his house, fencing a pasture, building a stable, and other out buildings, and the completion of the well, which he commenced the day he went on the land; and from this concludes that his original settlement was in good faith, and so followed up with substantial evidences of his good faith as to entitle him to a title to the land.

What are sufficient acts of good faith in a homesteader settling upon the public domain and what particular acts are sufficient evidence of the continuation in good faith of an original act of settlement which segregates the tract settled upon from the public domain, must necessarily vary with the varying circumstances of each particular case.

Acts that would indicate good faith in one person under his conditions and circumstances in life, might properly be held to show bad faith in another person who was differently situated and with different surroundings; and the determination of such question must be left to the judgment of those tribunals which are established for the purpose of disposing of the public domain; and when they have before them such facts as that, they may determine in good faith that the law has been complied with in a particular case, their determination is final. There was, therefore, no question of law presented by the petition of plaintiff, admitting the facts stated in the petition to be true, upon which a judgment might be entered holding that the title of the defendant was a trust for the plaintiff's use and benefit, and the demurrer was for this reason properly sustained by the lower court.

129 A second proposition is presented by the petition of the plaintiff intended to show that fraud and imposition was practiced on the plaintiff and on the officers of the land department, whereby the plaintiff was prevented from exhibiting his case fully to the officials of the land department on the hearing of such contest.

The petition alleges in substance that the defendant was not a qualified homestead entryman at the time he settled upon the land in question because of the fact that he was the owner of one hundred and eighty acres of land in Kansas, at the time, and until January 27, 1894, when he caused an ante-dated deed purporting to have been executed August 30, 1893, to be filed of record with the Register of Deeds of Morris County, Kansas, and upon the trial of the contest proceedings introduced a certified copy or abstract of such public record, showing such transfer to have been made August 30, 1893, to one A. C. Midkiff. When in truth and in fact the defendant was the owner of said land long after he had initiated his homestead right, and until the 27th day of January, 1894; that such act deceived the plaintiff and imposed upon the officers of the land department and caused them to believe and find in said *content* proceedings that said conveyance was made prior to the date of defendant's settlement upon the land in question, and that he was, therefore, fully qualified to make such settlement.

An examination of the record shows that the secretary did so find upon the testimony before him, *i. e.*, that the defendant was

not qualified because of any interest he then had in said one hundred and eighty acres of land.

130 The fraudulent act of the defendant here presented is the fact that he produced the abstract showing that he was not the owner of the land. As we have heretofore stated this question can only be determined from the findings of the Secretary. It is not shown that the plaintiff was prevented from making a full and free investigation of the fact as well before as after the trial of the case. This contest had been pending five years before it was finally concluded, the last hearing was with full notice, and all the parties appeared, submitted their proof and their cause to the determination of the land tribunal.

It would be a novel proposition if one of the parties could afterwards secure the judgment of a court holding the title granted by the government a trust for his use, because of facts existing which he did not produce, because he saw fit to rest his case upon the facts produced by his adversary, and which fact- yet remains undetermined, and are without existence in fact so far as the court is able to say, except from the allegations of the petition. Such a proposition has never been entertained by any court and it is not admitted by the demurrer.

In Cagle *v.* Dunham, 14 Ok. 610, this subject matter was fully discussed, and we do not feel that it is necessary here again to review the same.

Finding no error in the record the judgment of the court below is affirmed; all the justices concurring, except Hainer, J.: who presided on the trial below, and Pancoast, J., absent.

131 In the Supreme Court of the Territory of Oklahoma.

UNITED STATES OF AMERICA, *Territory of Oklahoma, ss:*

Certificate.

I, Benj. F. Hegler, Clerk of the Supreme Court of the Territory of Oklahoma, do hereby certify that the foregoing 130 pages numbered from 1 to 130, inclusive, are a true and complete transcript of the record and all proceedings in said Supreme Court in the case of John R. Greenameyer, Plaintiff in error, *vs.* Isaac C. Coate, Defendant in error, as the same remain upon the files and records of said Supreme Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Supreme Court, at the City of Guthrie, this 11th day of May, A. D. 1907.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk of the Supreme Court of the Territory of Oklahoma.

Endorsed on cover: File No. 20,749. Oklahoma Territory supreme court. Term No. 346. John R. Greenameyer, appellant, *vs.* Isaac C. Coate. Filed May 31st, 1907. File No. 20,749.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1907, No. 346

JOHN R. GREENAMEYER,
APPELLANT.

VS.

ISAAC C. COATE,
APPELLEE.

No. 20,749

STATEMENT, BRIEF AND ARGUMENT ON BEHALF OF THE APPELLANT.

STATEMENT OF THE CASE.

This cause was originally commenced in the District Court of Kay County, of the Territory of Oklahoma. The plaintiff, upon leave of court, filed a second amended petition to which the defendant interposed a demurrer, which was sustained by the District Court. The case was then taken to the Supreme Court of the Territory of Oklahoma and that court affirmed the decision of the lower court. This last decision is brought here for review by this appeal.

The petition which is set out at length in the record alleges, in substance: That on the 19th day of September, 1893, the plaintiff, John R. Greenameyer, filed in the United States Land Office, at Perry, Oklahoma, a soldier's declara-

tory statement, covering lote one (1) and two (2) and the East half of the Northwest quarter of section eighteen (18), of township twenty-six (26) North of range two (2) East of the Indian Meridian lying and being in the County of Kay, in the Territory of Oklahoma, which statement was numbered 53, upon the records of the land department; that the plaintiff was a qualified soldier and legally entitled to file such statement, and that thereafter, and on the 8th day of March, 1894, he transmuted his soldier's declaratory statement into Homestead entry No. 5588, covering the same premises. The plaintiff improved the premises as provided by statute and departmental regulation, and in due time presented final proof of residence and compliance with the homestead laws of the United States. Prior to the tender of final proof and on the 24th day of November, 1893, the defendant, Isaac C. Coate made Homestead entry upon the premises above described, Numbered 4447, subject to plaintiff's Soldier's declaratory statement, above mentioned, and on the 4th day of March, 1904, the defendant, Coate, filed a contest affidavit in the local land office at Perry, Oklahoma, alleging prior settlement on the land, on the 16th day of September, 1893, and three days prior to the filing of the Soldier's declaratory statement, above referred to.

The petition shows that upon due notice, the contest came on for hearing before the local land office, and that a decision was rendered and that after several appeals and rehearings, the department of the Interior, finally awarded the land to the defendant, Coate, and ordered the plaintiff's entry cancelled; that thereafter, the defendant, Coate, tendered final proof of settlement under the Homestead law; that this proof was received and that a patent was issued by the Government, conveying the land in question to Isaac C. Coate.

It is further alleged in the petition, as a second cause of action, that prior to and at the time of the filing by the defendant, Coate, upon the premises in question, Coate was the owner of more than One Hundred and Sixty acres of land, located in the State of Kansas, and that he was not a legal entryman; that at the time of the filing and upon the various hearings before the land department, he fraudulently concealed this fact from the officers of the department, and that he concealed it from the plaintiff; that the plaintiff did not discover the facts with which to substantiate this claim until after the contest was closed, and a patent had issued, whereby the land was conveyed to defendant; that on the hearing of the contest the defendant falsely deposed that he had disposed of the Kansas land before he attempted to settle or file on the land in question; that such claim was unfounded in truth and in fact, and that it was made for a fraululent purpose, and for the purpose of cheating and defrauding the Government, and the plaintiff; that the plaintiff exercised due diligence in exposing such fraud and concealment, but that he was prevented and forestalled through the efforts and cunning of the defendant; that in order to deceive the plaintiff and the officers of the land department, with reference to the ownership of the Kansas land, he caused an ante-dated deed to be placed on record in the office of the Register of Deeds of Morris County, where the land was situated, purporting to convey the land, or a portion of it to one A. C. Midkiff, a son-in-law of the defendant, prior to the date of defendant's alleged settlement, to-wit: August 30th, 1893. It is alleged in the petition that this deed was fictitious and that it was made for the purpose of avoiding the effect of the statute of the United States, and for the purpose of evading the same; that in truth and in fact, the defendant, Coate, was the owner

of the Kansas land at the time of the alleged settlement and filing on the premises.

The petition sets out as exhibits, the various decisions of the land department and finally prays that it be decreed that the title is held in trust by the defendant, Isaac C. Coate, for the use and benefit of this plaintiff.

SPECIFICATIONS OF ERROR.

I.

The Supreme Court of the Territory of Oklahoma erred in sustaining the defendant's demurrer to the plaintiff's petition.

II.

The Supreme Court of the Territory of Oklahoma erred in failing to hold that the Hon. Secretary of the Interior misapplied the law to the facts assumed in the opinion of the Hon. Secretary, and in failing to hold that the filing of the Homestead Entry on the part of the defendant, Coate, subject to the plaintiff's soldier's declaratory statement, estopped the defendant to allege prior settlement.

III.

The Supreme Court of the Territory of Oklahoma erred in failing to hold that the Hon. Secretary of the Interior misapplied the law in failing to hold that the acts assumed to have been performed by said Coate upon the premises did not constitute settlement within the meaning of the statute relating to homsteads.

IV.

The Supreme Court of Oklahoma erred in failing to hold that the allegations in the plaintiff's petition in regard to the fraudulent concealment of the facts with relation to the

ownership of the Kansas land, at the time of the alleged settlement filing and before the officers of the Land Department was insufficient to warrant a court of equity to give relief to the plaintiff, the party directly affected by such fraud and concealment, and in failing to hold that upon the facts admitted by the demurrer the plaintiff is the true and lawful owner of the premises in question, and that the defendant holds the title thereto in trust for him.

ARGUMENT.

It is well understood that in a case of this kind, the scope of inquiry is narrowed down to two propositions, viz: Does the record show that the facts assumed by the Honorable Secretary of the Interior do not support the legal conclusions and judgment rendered, and does the record disclose such fraud and concealment on the part of the successful party in the contest matter, as will warrant a court of equity to take jurisdiction and render such a decision as would have been rendered by the land department had the law been correctly applied; and had no fraud been practised?

The plaintiff claims that the record disclosed a state of facts, which, if assumed to be true, rendered the consideration of the contest instituted by Isaac C. Coate against the claim and entry of the plaintiff based on a claim of prior settlement, a misinterpretation and misapplication of law. The petition alleges the fact to be and the several decisions of the Land Department, attached thereto, in summarizing the facts, assume that on the 24th day of March, 1894, Isaac C. Coate filed on the premises in question, under H. E. N. 4447, subject to the Soldier's Declaratory statement, filed by the plaintiff, Greenameyer, on the 19th day of September, 1893. The filing of this Declaratory statement vested the plaintiff with

a preference right in the premises covered thereby for a period of six months.

Section 2304 United States Statutes relating to the filing of Soldier's Declaratory statement, reads as follows:

> Every private soldier and officer who has served in the Army of the United States, during the recent rebellion, for ninety days and who was honorably discharged and has remained loyal to the Government, including the troops mustered into the service of the United States, by virtue of the third section of the act approved February 13th, 1862, and every seaman, marine, and officer, who has served in the Navy of the United States, or in the Marine Corps, during the rebellion for ninety days, and who was honorably discharged, and has remained loyal to the Government, shall, on compliance with the provisions of this chapter, as hereinafter modified, be entitled to enter upon and receive patents for a quantity of public lands, not exceeding one hundred and sixty acres, or one quarter section to be taken in compact form, according to legal subdivisions, including the alternate reserved sections of public land along the line of any railroad, or other public work, not otherwise reserved or appropriated, and other lands subject to entry under the homestead laws of the United States; but such homestead settler shall be allowed six months after locating his homestead, and filing his declaratory statement, within which to make his entry and commence his settlement and improvement."

In making his homestead entry on the 24th of November, 1893, subject to this Soldier's declaratory statement, the defendant, Isaac C. Coate, recognized this preference and vested right of the plaintiff.

> "A party cannot blow hot and cold. A party by acquiescing in, or acknowledging the title of another, or standing by and seeing another making costly improvements or recognizing a claim or lien of another, is estopped from subsequently disputing its validity."

Herman on Estoppel, Vol. 2, sec. 1069.

Broyles vs. Nowlin, 59 Tenn. 191.

Moale vs. Baltimore, 56th Md. 496.

Hart vs. Huguet, 33 La. Am. 362.

Betts vs. Worth, 32 N. J. Eq. 32.

No one will contend that Coate could have had any right to a patent for the premises, if he had not filed thereon in the manner provided by the statute. If there had been a prior settlement, a subsequent filing would revert back to the time of settlement, providing the filing was completed within the statutory time, but having made his filing expressly subject to the Soldier's right of the plaintiff, he cannot be heard to allege a state of facts inconsistent with his own filing. It was, therefore, a misapplication of the law to receive or consider proof denying the soldier's preference right, once solemnly recognized in the very filing made by Coate, without which he could have no right under the facts in the contest case.

The third specification of error is answered by a reference to the record.

> "If it should be conceded that everything claimed to have been done by Coate, in the way of settlement, were true, his said acts would not in the judgment of this department, constitute him a bona fide settler prior to the 19th day of September, 1893, when the defendant made his declaratory statement of record. Coate reached the land between one and two o'clock on the afternoon of the opening, and remained on or adjacent to the claim until the 20th—four days. All that he did in these four days was to stick his flag and dig a hole, which he calls the starting of a well, two feet deep and 2½ or 3 feet across. He then left and went back to his home in Kansas, 150 miles distant. The digging of this hole would not require more than one hour's labor by

> one man. This was all he did between the 16th and the 20th, while he remained on or near the claim prior to his return to Kansas. Record page 45."

No one claims that the foregoing is not a true summary of the facts, and we respectfully contend that the conclusion reached by the Hon. C. N. Bliss, then Secretary of the Interior was correct, and that the conclusion reached by the Hon. A. E. Hitchcock, his successor in office, upon the same facts, is a misapplication of law, and the Supreme Court of the Territory of Oklahoma erred in failing to so hold.

The fourth assignment of error relates to matter, which was not before the Interior department. It is alleged in the second cause of action set forth in the petition that at the time Coate made his filing on the premises in question, and at the time of his alleged prior settlement, he was the owner in fee of 180 acres of land in Morris County, Kansas; that in order to evade the statute of the United States, providing that an entryman must make proof before acquiring any rights under the homestead statutes, that he is not the owner of more than 160 acres of land, he executed and caused to be recorded in the office of the Register of Deeds of Morris County, Kansas, a purported deed covering a sufficient portion of this Kansas land, so as to bring himself within the terms of the statute. It is positively alleged in the petition, and by the demurrer admitted before this court, that this deed was dated back; that it was not made until after Coate filed on the land in question, and that in truth and in fact, no conveyance was ever made to the grantee named in the deed; that the facts with reference to the making and recording of this deed were concealed from the plaintiff and the officers of the Land Department, and that the truth in regard to this deed and purported transfer of a portion of the Kansas land was fraudulently concealed from the plaintiff, and that the plaintiff did

not discover the true state of affairs in regard to this until after the contest was closed and a patent had issued; that the plaintiff used every means at his command to ascertain these facts.

The Supreme Court of Oklahoma practically ignores these allegations, and holds that the demurrer does not have the effect of admitting them. This is error.

As stated before, we do not deny that the scope of inquiry in this class of cases is limited. That the determinations of land officers is conclusive on courts in the absence of fraud or mistake of law.

Shepley vs. Cowen, 91 U. S. 340.

Moore vs. Robbins, 96 U. S. 535.

Marquez vs. Frisbie, 101 U. S. 476.

Lee vs. Johnson, 116 U. S. 51.

Carr vs. Fife, 156 U. S. 50.

Burfenning vs. Chicago, etc. R. Co., 163 U. S. 323.

Johnson vs. Drew, 171 U. S. 99.

It may also be conceded that every trick or false or fraudulent act practised by a successful upon a defeated party does not authorize a court of equity to take jurisdiction and re-examine the controversy. This is clearly shown by the authorities cited by the Supreme Court of the Territory of Oklahoma in the case of *Cagle vs. Dunham,* 14 Okla. 610, which case is claimed to be followed by this court in this case. We find no fault with the Cagle-Dunham decision, but we do not find anything in that case or in the decisions cited which ought to be controlling here. This is said:

"There is simply the allegation that the defendant, Dun-

ham, and certain named witnesses testified falsely, touching the plaintiff's residence upon the land, and in substance that from September 1893 to 1897, the plaintiff had been upon the land only occasionally and had not resided thereon continuously as by the homestead law required, followed that by reason of such testimony the Secretary of the Interior was misled." Surely if that sort of allegation or proof were sufficient to set in motion the equity power of the courts in land cases, it would be safe to assume that every land contest would ultimately find its way into the courts, and we know that such is not the law.

The fraud here claimed is of a different character. This is not a mere claim by the defeated party that the other party and his witnesses perjured themselves. In this case, the defendant, Coate, could not possibly have recovered the land, if the facts, as the plaintiff now claims them to be, had been shown to the officers of the land department, or if the plaintiff could have discovered them before the patent issued. The fraud here in question goes to the essence of the matter. Can it be supposed that a court would permit a patent to stand in a case where there was a positive allegation that an entryman had made a false affidavit with reference to his citizenship, and had substantiated his false claim by submitting forged naturalization papers? The statute, section 2289, makes several requirements, each one of which must be met before a valid filing can be made. One of the requirements is that the entryman must prove that he is not the proprietor of more than one hundred and sixty acres of land in any State or Territory. In this case the defendant did attempt to meet these statutory requirements, but it now appears that he was the owner of more than 160 acres of land, located in the State of Kansas, at the time he attempted to file on the premises in

question; that he claimed to have disposed of a portion of the Kansas land, and that he made proof of this fact by producing an abstract of title showing that he had deeded the land away in the month of August, next prior to the time he claims to have settled upon this claim. The petition alleges that this deed was wholly fictitious; that it was dated back; that it was not executed until after the time Coate made his filing, and that he, the plaintiff, did not discover the truth with reference to this transaction until after the patent had issued. Now, certainly, no one will claim that the truth in regard to this transaction would not have affected the decision of the Hon. Secretary of the Interior, or that if it had not, that the court would hesitate to exercise its corrective power over such decision.

After reviewing several cases, the court in the case of *Cagle vs. Dunham*, says:

> "From this it will appear that the fraud practised, which is sufficient to set aside a final decree, is one that arises extrinsically, that prevents a party from having a fair trial, or having any trial for the development of the truth in the premises, and not a case where a full, fair and free trial is had or tendered, wherein the person alleged to have been defrauded was present and heard and saw what is alleged to have been the perpetration of a fraud, and had *then and there* the opportunity to refute it, which he failed to do; or believing himself to have successfully done it, submitted his cause for final determination. In such case we hold that the conclusion reached is final and cannot be reviewed in an action setting out such fraud."

We fully agree with this exposition of the law, but how can it be claimed, in view of the allegations of the petition, that the plaintiff, Greenameyer, was in a position "then and there" to refute the fraud. It may be that the plaintiff sus-

pected that this transfer of the Kansas land was not just right, but how could he prove that it was not? Fraud every one knows, is seldom acted out on the housetops. It was very easy to date this deed back and it was not easy for the plaintiff to discover the true state of affairs between Coate and his son-in-law.

The allegations of the petition present such a case of fraud, cunning and deceit as will warrant a court of equity to grant relief, under the decisions cited and referred to by the Supreme Court of Oklahoma, from which this appeal is taken, and under the numerous decisions of this court.

Johnson vs. Towsley, 13 Wall. 86.

Vance vs. Burbank, 101 U. S. 519.

Craig vs. Leitensdorfer, 123 U. S. 212.

Gunzales vs. French, 164 U. S. 342.

Quimbie vs. Conlan, 104 U. S. 425.

Lytle vs. Arkansas, 22 How. 203.

Calhoun vs. Violet, 173 U. S. 63.

The legal title has passed from the Government, and the plaintiff could not obtain any relief in the land department, but in cases of this kind, it is well settled by the decisions of this court, that where a patent has been wrongfully or fraudulently obtained, equity will treat the fraudulent patentee as a trustee for the party against whose rights the fraud has operated and decree a transfer of the legal title to the party who, but for the wrong or fraud, would have received the title. A quotation from the case *In re Emblem,* 161 U. S. 52, covers this proposition fully.

"The patent conveys the legal title to the paten-

tee and cannot be revoked or set aside except upon judicial proceedings insituted in behalf of the United States. The only remedy of Emblem is by bill in equity to charge Weed with a trust in his favor. All this is clearly settled by previous decisions of this court."

Johnson vs. Tousley, 80 U. S. 13.

Moore vs. Robbins, 96 U. S. 530.

Marques vs. Frisbie, 101 U. S. 473.

St. Louis Smelt. & Refining Co. vs. Kemp, 104 U. S. 636.

Steel vs. St. Louis Smelt & Refining Co., 106 U. S. 447.

Monroe Cattle Co. vs. Becker, 147 U. S. 47.

Turner vs. Sawyer, 150 U. S. 578.

Emblem vs. Lincoln Land Co., 184 U. S. 659.

As the question here arises upon demurrer, no final decree directing the transfer of the title would be proper, for under the law, the defendant is entitled to answer over. The Supreme Court of the Territory of Oklahoma erred in sustaining the demurrer. This decision should be reversed, and the demurrer should be overruled.

Respectfully submitted,

JOHN W. ADAMS,
Attorney for Appellant.

KOS HARRIS,
WILLIAM E. KEITH,
Of Counsel for Appellant.

IN THE

Supreme Court

OF THE

United States

Office Supreme Court
FILED
DEC 9 19
JAMES H. McKE

OCTOBER TERM, 1908

JOHN R. GREENAMEYER,
Appellant,

vs.

ISAAC C. COATE,
Appellee.

No. 100

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

BRIEF OF DEFENDANT IN ERROR.

THE REPUBLICAN NEWS JOURNAL, NEWKIRK, OKLAHOMA

IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1908

JOHN R. GREENAMEYER,
Appellant,

vs.

ISAAC C COATE,
Appellee.

No. 346.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The Plaintiff in Error, on June 20th, A. D. 1903, filed his petition in the District Court of Kay County,

Oklahoma Territory, against the defendant in error, in which petition he asked that the court decree a resulting trust in his favor and against the defendant, for Lots One (1) and Two (2) and the East Half of the North-West One quarter of Section Eighteen (18) Township Twenty-six (26) north of range two (2) East of the Indian Meridian, Kay County, Oklahoma Territory, to which petition the defendant in error filed his general demurrer, and said demurrer was by the court sustained, and the plaintiff in error asked and obtained leave to file an amended petition; which amended petition was duly filed; and to which amended petition the defendant, filed in due time, his demurrer; which demurrer was by the court sustained; and the plaintiff in error again asked for and obtained leave of court to amend his petition, and on September 5th, 1904, the said plaintiff in error filed in this cause, his second amended petition containing two causes of action. The first cause of action charges substantially: that the land involved in this cause was a part of the Cherokee Outlet opened to settlement at Noon Central Standard Time on the 16th day of September, 1893, pursuant to the Act of Congress approved March 3rd, 1893, and the Proclamation of the President of the United States thereunder issued and dated August 9th, 1893.

That the plaintiff was in all respects a duly qualified homestead entryman, and as such filed his homestead entry on the said land, which entry was contested by the defendant, and said contest was finally determined by the Secretary of the Interior in favor of the defendant and against the plaintiff, and the homestead entry of the plain-

tiff cancelled, and the rights of the defendant to the said land were held by the Honorable Secretary of the Interior to be both prior and superior to those of the plaintiff. And that subsequently, the defendant submitted his final proof and secured a Patent to said land. And further charging misapplication of the law by the Honorable E. A. Hitchcock, Secretary of the Interior.

Plaintiff in error in his second cause of action charges substantially, that the defendant, Isaac C. Coate, prevailed in the contest proceedings by and through fraud and imposition, practiced both upon the Land department and the plaintiff Greenameyer. That said fraud and imposition was the cause of the plaintiff's defeat. That on or about the 1st day of December, 1893, the plaintiff learned that defendant Coate then was the owner of one hundred and eighty acres of land located in Morris county, Kansas. That Coate caused it to appear that he had sold and conveyed said land, on the 30th day of August, 1893, when in truth and in fact he continued to own the same, and was thereby disqualified from acquiring the land in controversy. And that at this time, he is able to show that Coate owned said land at the date of his, Coate's, settlement on the land in controversy. The plaintiff attached to his petition as exhibits, the decisions of the local land office, and of the Commissioner of the General Land Office and Secretary of the Interior.

No evidence taken in said contest proceedings was attached to plaintiff's petition. To which second amended petition of the plaintiff filed herein, the said Coate filed his demurrer. (See Record, Page 66.)

Said demurrer came regularly on for hearing on September 5th, 1904, and was by the court sustained. And the plaintiff electing to stand on said second amended petition, asked and obtained leave to make and serve a case made in this cause, for the Supreme Court of the Territory of Oklahoma. The Supreme Court of the Territory of Oklahoma affirmed the judgment of the District Court from which latter decision the plaintiff in error appealed to this Court.

ARGUMENT.

There are two causes of action set forth in the plaintiff's second amended petition. In the first cause of action, misapplication of the law to the facts found by the Department Officials is alleged as the ground for the equitable relief prayed for therein.

The second cause of action in said petition is based on alleged deceit, fraud, and imposition practiced by the defendant upon the plaintiff and the officers of the Land Department in the contest proceedings.

As to the first cause of action in plaintiff's petition. The findings of fact made by the Secretary of the Interior on which the land was awarded to the defendant are attached to, and made a part of the plaintiff in error's petition, marked Exhibit G. (See Record, pages 56-64.) The Secretary in said decision in his conclusions says:

> "Coate had never, from the time he first reached and staked the land, down to the present, abandoned his purpose to hold it as his homestead. His acts were sufficient to give notice of his claim, and if his residence was not established when he staked, claimed, slept upon and improved it with the in-

tention of making it his home, it certainly was established when he built a house upon it, moved his family and his property into it, set out his orchard and made other improvements necessary and proper for a home, and this must be held to have been done in a reasonable time under all the circumstances."

(Record, Pages 63-64.)

The question of what are sufficient acts of good faith on the part of one settling upon government land, and what particular acts are sufficient evidence of the continuance of an original act of settlement which segregates the tract settled upon, must necessarily vary with the varying circumstances of each particular case, and the determination of such question must be left to the judgment of those tribunals which are established for the purpose of disposing of the public land; and it is submitted that when such tribunals determine in good faith that the law has been complied with in a particular case, their determination is final.

In the case at bar, after a hearing with full notice in which all the parties appeared and submitted their proof, it was determined by the local office, the general land office, and the Secretary of the Interior, that from the testimony, the defendant, settled on the land in question, on the 16th day of September, 1893; that the plaintiff filed on the tract in question his soldier declaratory statement on September 19th, 1893; that the initial acts of settlement of the defendant were sufficient to give him a valid homestead right to the land; and that the subsequent acts of the defendant with regard to residence upon and improvement of the land were such substantial evidences of good faith from the com-

mencement of his original settlement as to entitle him to a title to the land. (See Record, Pages 56-64.)

The land department of the government is supreme in determining the facts upon which and by reason of which a person may acquire title to Government land, which facts are determined under rules of practice adopted by that department, governing the procedure before officials of the department in the determination of individual rights.

In the case of Moore v. Robbins, 96 U. S. 530, Mr. Justice Miller speaking for the court, said:

> "That the decision of the officers of the land department, made within the scope of their authority, on questions of this kind, is, in general, conclusive everywhere, except when reconsidered, by way of appeal within that department, and that as to the facts upon which their decision is based, in the absence of fraud or mistake, that decision is conclusive even in courts of justice, when the title afterwards comes in question but that in this class of cases, as in all others, there exists in the courts of equity the jurisdiction to correct mistakes, to relieve against frauds and impositions, and in cases where it is clear that those officers have, by mistake of the law, given to one man the land which on the undisputed facts belonged to another, to give appropriate relief."

In the case of Marquez v. Frisbie, 101 U. S. 473, Mr. Justice Miller quoted approvingly the principle announced in Moore v. Robbins, supra, and said further:

> "The language of this court in Moore v. Robbins, cited above, is that equity will interfere when it is *clear* that these officers have, by mistake of the

law, given to one man the land which on the undisputed facts belonged to another. The meaning of this, and the sound principle, is, that where it is a mixed question of law and fact, and when the court cannot so separate them as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive; but if it can be made entirely plain to a court of equity that on facts about which there is no dispute, or no reasonable doubt, those officers have, by a mistake of law, deprived a man of his right, it will give relief."

The case of Burfenning v. Chicago, St. P., M & O. Ry. Co. 163 U. S. Reports 323 was a case where this Court held that a patent issued by the Land Department was void, and that case illustrates what is meant by the language used in Mraques v. Frizbie Supra that "if it can be made entirely plain to a court of equity that on facts about which there is no dispute, or no reasonable doubt, those officers have, by mistake of the law, deprived a man of his right, it will give relief."

The revised statutes of the United States excluded from pre-emption and homestead "lands included within the limits of any incorporated town or selected as the site of a city or town."

A patent was issued by the land department for a tract of land included within the limits of a city; this presented a clear case on the undisputed facts of a misapplication of the law for which the courts will grant relief. In the language of Mr. Justice Brewer in the Opinion—Burfenning v. Chicago et al:

"In other words the action of the land department can

not override the expresed will of Congress, or convey away public lands in disregard or defiance thereof.'

In the case at bar the land department did not override any act of Congress, but on the contrary carried out the intent of the law that has conferred upon it the right to pass finally upon all questions of fact.

In the case of Vance v. Burbank, 101 U. S. 514, Mr. Chief Justice Waite said:

> "So far as this suit depends on the original title of Lemuel Scott, it is clear, under the well-settled rules of decision in this court, that there can be no recovery. The question in dispute is one of fact; that is to say, whether Scott, when he demanded his patent certificate as against the other contesting claimants, had resided on and cultivated the lands in dispute for four consecutive years, and had otherwise conformed to the requirements of the donation act. This was to be determined by the Land Department, and as there was a contest, the contending parties were called on in the usual way to make their proofs. They appeared, and full opportunity was given Scott to be heard. He presented his evidence and was beaten, after having taken the case through by successive stages on appeal to the Secretary of the Interior. This, in the absence of fraud, is conclusive on all questions of fact. We have many times so decided. Johnson v. Towsley, 13 Wall. 72; Warren v. Van Brunt, 19 id. 646; Shepley at al v. Cowan et al., 91 U. S. 330; Moore v. Robbins, 96 id. 530; Marquez v. Frisbie, supra, p. 473. The appropriate officers of the Land Department have been constituted a special tribunal to decide such questions, and their decisions are final

to the same extent that those of other judicial or quasi-judicial tribunals are."

In Quinby v. Conlan, 104 U. S. 420, Mr. Justice Field, speaking for the court, said:

"But, independently of this conclusion, there is a general answer to the alleged erroneous rulings of the officers of the land department as grounds for the interference of the court. These rulings were upon mere matter of fact, or upon mixed questions of law and fact, which were properly cognizable and determinable by the officers of that department. The laws of the United States prescribe with particularity the manner in which portions of the public domain may be acquired by settlers. They require personal settlement upon the lands desired, and their inhabitation and improvement, and a declaration of the settler's acts and purposes to be made in the proper office of the district within a limited time after the public surveys are extended over the lands. By them a land department has been created, to supervise all the various steps required for the acquisition of the title of the government. Its officers are required to receive, consider, and pass upon the proofs furnished as to the alleged settlements upon the lands, and their improvements, when pre-emption rights are claimed, and, in case of conflicting claim to the same tract, to hear the contesting parties. The proofs offered in compliance with the law are to be presented, in the first instance, to the officers of the district where the land is situated; and from their decision an appeal lies to the Commissioner of the general land office, and from him to the Secretary of the Interior. For mere errors of judgment as to the weight of evidence on these subjects by any of the

subordinate officers, the only remedy is by an appeal to his superior of the department. The courts cannot exercise any direct appellate jurisdiction over the rulings of those officers, or of their superiors in the department, in such matters; nor can they reverse or correct them in a collateral proceeding between private parties. In this case the allegation that false and fraudulent representations as to the settlement of the plaintiff were made to the officers of the land department is negatived by the court. It would lead to endless litigation, and be fruitful of evil, if a supervisory power were vested in the courts over the action of the numerous officers of the land department on mere questions of fact presented for their determination. It is only when those officers have misconstrued the law applicable to the case as established before the department, and thus have denied to parties rights which upon a correct construction would have been conceded to them, or where misrepresentation and fraud have been practiced, necessarily affecting their judgment that the courts can, in a proper proceeding, interfere, and refuse to give effect to the action. On this ubject we have repeatedly, and with emphasis, expresed our opinion, and the matter should be deemed settled. And we may also add, in this connection, that the misconstruction of the law by the officers of the department which will authorize the interference of the court must be clearly manifest, and not alleged upon a possible finding of the facts, from the evidence, different from that reached by them. And, where fraud and misrepresentations are relied upon as grounds of interference by the court, they should be stated with such fullness and particularity as to show that they must necessarily have affected the action of the

officers of the department. Mere general allegations of fraud and misrepresentations will not suffice."

The land department in the case at bar passed upon the question of the qualifications of the defendant, and the acts he had performed to secure title to the land in controversy, and decided from the evidence that he was qualified, and that his acts were sufficient to entitle him to the land. Its judgment in these matters is unassailable.

In the cae of Steel v. Smelting Co., 106 U. S. 447, 1 Sup. Ct. 389, Mr. Justice Field said:

"We have so often had occasion to speak of the land department, the object of its creation, and the powers it possesses in the alienation, by patent, of portions of public lands, that it creates an unpleasant surprise to find counsel, in discussing the effect to be given to the action of that department, overlooked our deciions on the subject. That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open for sale. Its judgment upon these matters is that of a special tribunal, and is unassailable, except by direct proceedings for its annulment or limitation. Such has been the uniform language of this court in repeated decisions."

In Baldwin v. Starks, 107, U. S. 463, 2 Sup. Ct. 473,

in reviewing this action, Mr. Justice Miller, speaking for the court, said:

> "That record shows that upon all the questions involved the department decided in favor of Starks, except one, which was that he was disqualified to make the pre-emption claim he was then prosecuting, by reason of having previously exercised that right in regard to other lands. Whether he had thus made a filing of a former declaratory statement was a question of fact much contested before the department, in regard to which Starks himself was sworn, as were also several other witnesses, and the record of the alleged filing was also produced. On all this evidence the commissioner of the general land office decided that he had filed the previous declaration, and was therefore disqualified as a pre-emptor of the land now in controversy. On appeal to the Secretary of the Interior, this decision was affirmed, and Starks' claim was rejected, and Van Pelt's allowed, and the patent issued to him. The supreme court of Nebraska holds that the land department decided this question of fact erroneously, and that Starks never filed or made the former declaratory statement, that he was a qualified pre-emptor for the land patented to Van Pelt, and decreed a conveyance to him by Baldwin of the legal title vested by the patent. It has been so repeatedly decided in this court, in cases of this character, that the land department is the tribunal appointed by congress to decide questions like this, and when finally decided by the officers of that department the decision is conclusive everywhere else as regards all questions of fact, that it is useless to consider the point further. Where fraud or imposition has been practiced on the party interested, or on the officers of the law, or where these

latter have clearly mistaken the law of the case, as applicable to the facts courts of equity may give relief; but they are not authorized to re-examine into a mere question of fact, dependent on conflicting evidence, and to review the weight which those officers attached to such evidence."

"A finding of fact by the land department that a homestead entryman has compiled with the requirements of the law as to settlement and improvement is conclusive upon the courts."

(N. Pac. R. Co. v. McCormick, 89 Fed. 689.)

In the case of De Cambra v. Rogers, 189 U. S., P. 119, the Syllabus reads as follows:

"In an ordinary contest between two applicants for pre-emption, in which the officers of the Land Department have decided upon the testimony in favor of one and against the other, the decision of the Land Department on questions of fact is conclusive upon the courts.

"When the Secretary of the Interior has made a decision in such a contest the courts will not entertain an inquiry as to the extent of his investigation and knowledge of the points decided, or as to the methods by which he reached his determination."

Applying the principle established by the above cases it would seem that if there is any evidence which tends, in any degree, however slight, to support the conclusion of the Secretary as announced in his opinion, then such conclusions become final, and a court of equity will not interfere.

The record in this case shows that the officers of the land department found that the defendant was a quali-

fied settler; that he was first in point of time on the land in question; that he settled upon it in good faith, and that he followed up his initial acts of settlement with substantial improvements, and in due time established upon said land his permanent residence. These things they found as facts in a contested case where the parties were present and heard. The evidence taken on the contest trial is not attached to plaintiff's petition, and not found in the record except as the Secretary of the Interior in his final decision recites the facts of the defendant's acts, and he concludes from the evidence that they are sufficient to entitle him to the land and patent to the same finally issued to the defendant.

What law was misapplied? and wherein does it appear from the record that it is clear from the undisputed facts in the case that the Secretary of the Interior misapplied the law?

The language used by Mr. Justice Brewer in the case of DeCambra v. Rogers, 189 U. S., Page 121,

"and if they misapplied any rule of law to the testimony, we are not advised of the rule they misapplied, or how they misapplied it," seems applicable in this case.

Another proposition raised by Plaintiff in error is, that Secretary Bliss found that the acts of settlement of the defendant Coate were insufficient to hold the land as against the soldiers declaratory filing of the plaintiff Greenameyer, and that the decision subsequently of Secretary Hitchcock, the successor in office, of said Secretary Bliss, was had upon the same issues of law in the matter

of the sufficiency of said Coate's initial acts, as were theretofore determined by his predicessor in office, and that the said Secretary Hitchcock was therefore without power, authority, or jurisdiction to render the decision awarding the land in question to defendant.

The record shows that on June 21st, 1898, and October 5th, 1898, the cause was determined by the then Secretary of the Interior, C. N. Bliss, the decision of June 21st, 1898, being a determination of the facts in favor of the plaintiff (see Record, P. 41-Ex C), and that of October 5th, 1898, was a denial of a review (see Record, P. 44-Ex D), but before the entry of judgment denying such review was had and entered, the defendant filed his petition for a re-hearing in said cause, which was granted December 13, 1898. (See Secretary Hitchcock's decision, Page 57, Record, Exv. G.).

A rehearing was accordingly had, all the parties appearing in person and by attorneys and on August 31st, 1899, the local land office found the issues in favor of the defendant (See Record P. 48, Ex. E.), from which an appeal was had to the general land office, where the decision of the local office was affirmed January 15th, 1900 (See Record P. 51, Ex. F.), and from such decision the case was by appeal again brought before the Secretary of the Interior, who affirmed the decision of the general land office and revolked the decision of the Secretary of June 21st, 1898. (See Record P. 56,64, Ex. G.).

The findings of Secretary Bliss were not ultimate findings of fact in said contest proceedings. While said contest proceeding was pending before the department,

the Secretary of the Interior granted the petition for rehearing of the defendant, and after a re-trial of the contest case, and on the facts adduced on the re-trial of said contest it was found by the land tribunal that the defendant was entitled to the land.

The department merely reconsidered a question passed upon in the progress of the cause. The findings of Secretary Hitchcock became and are the findings of ultimate facts, finally reached in said contest.

In the case of Potter v. Hall, 189 U. S. 292, Justice White in the opinion, says:

> "The fact that the final conclusion as to the ultimate facts reached by the department differed from the conception of such ultimate facts entertained by the department in previous stages of the controversy, affords no ground for disregarding the conclusion of ultimate fact finally reached, which was binding between the parties."

As to the second cause of action in plaintiff's petition.

A proposition is presented in the second cause of action of plaintiff's petition intended to show that fraud and imposition was practiced on the plaintiff, and on the officers of the land department whereby the plaintiff was prevented from exhibiting his case fully, to the officials of the land department on the hearing of such contest.

The fraud relied upon by plaintiff in his second cause of action, is that the defendant Coate was the owner of one hundred and eighty acres of land in Kansas, at the time he commenced his acts of settlement on the land in

controversy, and that he has recently discovered evidence to prove that fact.

This identical question of Coate being the owner of one hundred and eighty acres of land in Kansas, at the time of his settlement of the land in controversy was before the Secretary, when he made his decision, and was by him decided adversely to the plaintiff in error. The Secretary of the Interior in his final decision says: (See Record P. 56-64, Ex. G.).

> "As to the question that Coate was not, at the time of the opening, qualified to make homestead entry for the land because he was the owner of more than one hundred and sixty acres of land in Kansas, the proof fails to show that such was the case. It appears that he had previously owned one hundred and eighty acres in Morris county, Kansas, which was under mortgage to secure a debt about equal to the land, and that some time before the opening of the land in controversy to settlement he conveyed said Kansas land to his son-in-law, Medkiff, by a quit claim deed, subject to said mortgage debt, which was subsequently paid by Medkiff. Coate remained on the place some time after the execution of the deed, but it is not shown that he exercised any act of ownership over the land or ever afterwards pretended to claim it.
>
> "It was rented out by Medkiff who collected the rent and Coate is not shown to have had anything to do with the renting or sale of it. It appears that there was also a mortgage on some of Coate's personal property and that it was paid off by Medkiff either out of the proceeds of the rent or the sale of the Kansas land, and it is argued that Medkiff was

acting in the capacity of trustee or agent for Coate in the renting and selling of the land. The deed from Coate to Medkiff is not in the record and it is only stated to have been a quit claim deed, whereby Coate conveyed to Medkiff all the interest he had in the land. It is not shown that any trust was created by said deed or that Coate retained any interest in the land, or in any manner restricted Medkiff in the management and disposition of the property or interest conveyed to him by the deed. It cannot, therefore, be held that Coate was, at the time of the opening, the owner of the Kansas land and therefore disqualified from making entry for the land in question."

In the case of Vance vs. Burbank, 101 U. S. Rep., 519, which was a suit in equity, to determine the conflicting claims to a tract of land obtained from the government, the court said:

"It has also been settled that the fraud in respect to which relief will be granted in this class of cases must be such a has been practiced on the unsuccessful party, and prevented him from exhibiting his case fully to the department, so that it may properly be said there has never been a decision in a real contest about the subject matter of inquiry. False testimony or forged documents even are not enough, if the disputed matter has actually been presented to or considered by the appropriate tribunal, United States vs. Throckmorton, 98 U. S., 61; Marquez vs. Frisbie, supra. The decision of the proper officers of the department is in the nature of a judicial determination of the matter in dispute."

In the case of DeCambra vs. Rogers, 189 U. S. Rep., 119, the court said:

"As it appears affirmatively that, before the contest, DeCambra was informed of the nature of the wrongs he alleges were perpetrated on him by Rogers, it may be presumed that evidence was offered by both parties upon that question, and that it was decided adversely to his contention. Under those circumstances nothing is shown except an ordinary contest between two applicants for pre-emption, in which the land officers upon the testimony decided in favor of one and against the other But it is well settled that the decision of the land department upon questions of fact is conclusive in the courts. Burfenning vs. Chicago etc. Railway, 163 U. S., 321, 323 and the cases cited; Johnson vs. Drew 171 U. S., 93, 99; Gardner vs. Bonestell, 180 U S , 362. It is hardly necessary to say that when a decision has been made by the Secretary of the Interior, courts will not entertain an inquiry as to the extent of his investigation and knowledge of the points decided, or as to the methods by which he reached his determination.

The plaintiff in this case has not brought himself within the rule for which courts of equity will grant relief. As was said by the court in the case of United States vs. Throckmorton, 98 U. S. Rep., 65:

"There are no maxims of the law more firmly established, or of more value in the administration of justice, than the two which are designed to prevent repeated litigation between the same parties in regard to the same subject of controversy. * * * But there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to the suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented

from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side,—these, and similar cases which show there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hearing."

The plaintiff has not attempted to charge that the defendant in any manner or form hindered, delayed, or obstructed him in any way, in the full and free investigation and presentation of any and all matters pertaining to the issues in the contest case. The plaintiff knew all the parties, which were in any way connected with the alleged fraud, the grantor and grantee of the Kansas land and the Notary Public taking the acknowledgement of the grantor were all known to the plaintiff, and their evidence could have, at any time, been secured. He had as appears in the decision of the Secretary, certified copies of the records of the transfer of the Kansas lands, and he sent a lawyer to Morris County, Kansas, where that land was situated, and his lawyer spent a week investigating the alleged fraudulent transfer of the Kansas land by Coate; but that no fraud was discovered after the most diligent search. (See Record, Page 32.)

'A decree of the supreme court will not be set aside for perjury and fraud unless the perjury and fraud are collateral to the questions examined and determined in the action."

Friese v. Hummel et al, 37 Pacific Reports, page 458. In the opinion in the above case the court says:

"Did the complaint state sufficient facts to entitle the plaintiff to the equitable relief demanded? is the question involved in this suit. A court of equity may, by an original bill in the nature of a bill of review, set aside a decree obtained by the fraud of the pervailing party, where the acts or conduct constituting such fraud were not involved in the consideration of the merits. 2 Freem. Judgm. (4th Ed.) No. 485. A judgment or decree procured by perjury is doubtless a fraud, and such as would induce equity to grant relief, were it not for the fact that its existence can rarely or never be ascertained otherwise than by trying anew an issue tried in a former proceeding. Id. No. 489. Frauds for which a court of equity will set aside a judgment or decree must consist of extrinsic, collateral acts, not involved in the consideration of the merits. The credibility of testimony given on the trial of a cause, bearing upon the issue, is intrinsic, and has been considered in reaching the conclusion sought to be impeached; and the case is not the less tried on its merits, and the judgment is none the less conclusive, by reason of the false testimony produced. U. S. v. Flint, 4 Sawy. 42, Fed. Cas. No. 15,121. "Relief," says Allen, J., is Ross v. Wood, 70 N. Y. 8, "can only be granted upon some new matter of equity, not arising in the former case. Equity will not take cognizance, on the same grounds, of the

very point which another court of competent authority in the case has considered and decided." In Tebbets v. Tilton, 31 N. H. 273, it was held that fraud in a judgment might be shown by a party when it may be done without showing any participation in the fraud, and where it does not involve a re-examination of the merits of the case. In Folsom v. Folsom, 55 N. H. 78, it was held, in a suit to impeach a decree for fraud, that evidence, discovered after the trial, which showed that the decree had been obtained by perjury, was not newly discovered, but cumulative upon the same issues tried before. In Pico v. Cohn, 91 Cal. 129, 25 Pac. 970, and 27 Pac. 537, the facts showed that the plaintiff was over 80 years old, unused to business, and could not speak or understand the English language; that he owned real property to the value of $200,000, upon which there was an incumbrance of $63,000; that, being pressed for payment, he applied to one B. Cohn for, and obtained, a loan of that amount, to secure the payment of which he executed and delivered an absolute conveyance of all his property; that within two months from the time he received the loan he tendered to Cohn $65,000, and demanded a reconveyance, but upon Cohn's refusal to convey he commenced an action to recover said property; that, during plaintiff's negotiations with Cohn, one Pico Johnson was present, and knew that the transaction was a loan and security, and not a purchase and conveyance absolute, and shortly after the execution of the deed so stated to others, that, relying on Johnson's knowledge of the transaction, and his statements concerning it, plaintiff called him as a witness, when instead of testifying that the transaction was a loan and mortgage, he testified that it was a

sale and absolute conveyance, and upon the strength of his evidence a decree was rendered in favor of the defendant. In a suit brought to set aside this decree, it was alleged in addition to the foregoing facts, that plaintiff had made the discovery that Cohn had paid Johnson $2,000 to testify falsely, which sum was placed in the hands of one Forbes, with directions, given in Johnson's presence, to pay it to him if he testified to an absolute sale, and that immediately after he had so testified he demanded and received the money. A demurer to the complaint having been sustained by the lower court, the judgment was, upon appeal, affirmed, the court saying: "That a former judgment or decree may be set aside and annulled for some frauds, there can be no question; but it must be a fraud extrinsic or collateral to the questions examined and determined in the action. And we think it is settled beyond controversy that a decree will not be vacated merely because it was obtained by forged documents or perjured testimony." See notes to this case in 13 L. R. A. 336. The reason assigned in support of this rule is that causes once tried by a court having jurisdiction of the subject-matter and the parties should forever be at rest; that the unsuccessful party ought reasonably to expect, if he had an unscrupulous adversary, that perjured testimony would be offered at the trial, and should be prepared to meet it; and that, having gone into a consideration of the merits, he is estopped by the conclusion of the court. U. S. v. Flint, supra. The plaintiff not having alleged sufficient facts to entitle her to the equitable relief demanded, there was no error in sustaining the demurrer (Cotzhausen v. Kerting, 29 Fed. 821), and the decree is therefore affirmed.

In the case of Estes vs. Timmons, 12 Okla., 537, 73 Pac. 303, it is said:

> "As a general rule, the frauds for which a bill in chancery will be sustained to set aside a judgment or decree between the same parties, rendered by a court of competent jurisdiction, or special tribunal, are frauds extrincic or collateral to the matter tried by the court, and not a fraud which was an issue in the former suit."

There can be no doubt that the particular fraud now sought to be put in issue by the plaintiff in this case was an issue in the contest proceedings between these parties. This clearly appears from that portion of the decision of the Honorable Secretary last above quoted, and the same is admitted by the plaintiff in his petition.

The plaintiff does not claim that the evidence which he now claims to have discovered to sustain the allegations of fraud in his petition, were not in his possession long prior to the issuance of the Patent to the land in controversy. The executive department of the government had control over the land until Patent was issued. And the plaintiff, if the evidence which he now claims to have discovered could have afforded him any ground for relief, or would have in any way affected the final disposition of the land, should have presented the same to the land department The record in this case shows that the contest between the plaintiff and the defendant extended over a period of nearly seven years; that at the time of the initiation of said contest, the plaintiff knew of the alleged fraud which he now charges in his petiton, and had ample tme and opportunity to, and did, investigate same to the

fullest extent, and presented the same fully in his contest proceedings, to the various officers of the land tribunal, and that the matter now complained of by the plaintiff was considered fully by the department.

The principle established by the cases cited seems to be that the fraud practiced which is sufficient to set aside the final judgment is one that arises extrinsically, that prevents a party from having a fair trial, or having any trial for the development of the facts, and not a case where a full, fair, and free trial is had or tendered, wherein the person alleged to have been defrauded was present in person and by attorney, and heard and saw what is alleged to have been the perpetration of a fraud, and had then and there the opportunity to refute it, which he failed to do, or, believing himself to have successfully done it, submits his cause for final determination. In such case, it is respectfully submitted that the conclusion reached is final.

See Hass et al. v. Billings et al (Minn). 43 N. W. 797, relied upon and affirmed in Wilkins v. Sherwood, 56 N. W. 591; Gray v. Barton (Mich.) 23 N. W. 813; Lee v. Johnson, 116 U. S. 48, 6 Sup. Ct. 249, 29 L. Ed. 570; Cothausen v. Kerting (C. C.) 29 Fed. 821; Friese v. Hummel (Or.) 37 Pac. 458, 46 Am. St. Rep. 610.

Respectfully submitted.

C. L. PINKHAM.
W. S. CLINE.

GREENAMEYER *v.* COATE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 100. Submitted January 4, 1909.—Decided February 23, 1909.

When the Secretary of the Interior has jurisdiction of a land contest and grants a rehearing he is not, nor is this court, bound by the facts found by his predecessor on the original hearing, *Potter* v. *Hall*, 189 U. S. 292; after such a rehearing and when, as in this case, new testimony is allowed, the decision then made is the ultimate action of the department.

The holder of a patent obtained by error of law of, or fraud or imposition on, the Land Department, may be declared to hold the same as trustee for another; but the fraud must have been so practiced as to have prevented the unsuccessful party from fully exhibiting his case, and if the case has been fully considered the decision of the proper officers is in the nature of a judicial determination. *Vance* v. *Burbank*, 101 U. S. 514.

18 Oklahoma, 160, affirmed.

APPELLANT and appellee were respectively plaintiff and defendant in the courts below, and we shall so designate them.

Plaintiff brought this suit in the District Court of Kay County, Oklahoma, to be declared the owner of the legal title to lots 1 and 2 and the E. ½ of the N. W. ¼, section 18, township 26 N., R. 2 E., Indian Meridian, and to require a conveyance of the land to him by defendant. A demurrer to the petition was sustained and a judgment entered dismissing the suit, which was affirmed by the Supreme Court of the Territory.

The petition shows the following facts: August 9, 1893, a portion of the Territory, known as the Cherokee Outlet, was opened for settlement. The plaintiff complied with the terms of the proclamation of the President of the United States, and, having served as a soldier during the war of the rebellion for a period of two years, and being otherwise qualified, filed in the United States land office at Perry, Oklahoma, a soldier's declaratory statement for the land. On the eighth of March, 1894, he duly transmitted his declaratory statement into homestead entry No. 5588, for the same premises, moved a house upon and took up his residence upon them, and continuously lived thereon with his family from such time for seven years, cultivated 40 acres thereof, "cropped the same, and grazed 40 acres in addition," and erected improvements of the value of $450. That after such residence and cultivation he made application in due form to make final proof, which offer was rejected.

On November 24, 1893, the defendant made homestead entry No. 4447 upon the land, subject to plaintiff's soldier's

declaratory statement, and on the fourth of March, 1904, filed a contest affidavit in the land office at Perry, alleging settlement three days prior to such declaratory statement.

The contest came on for hearing before the local land office and that office decided in favor of defendant. This decision was reversed by the Commissioner of the General Land Office, and, on appeal to the Secretary of the Interior, by that officer. Their opinions and judgments are attached to the petition.

A petition for review being filed by defendant, a rehearing was ordered and the matter remanded to the local land office for further hearing upon questions of fact, but the petition for review was denied. The opinion of the Secretary is attached to the petition. The matter was duly heard by the local office, which office recommended adversely to plaintiff. The decision was affirmed by the Commissioner, and the homestead entry of plaintiff "held for cancellation, subject to the right of appeal." An appeal was taken to the Secretary of the Interior on July 3, 1900, and that officer reversed the departmental decision of June 21, 1898, in favor of plaintiff, affirmed the ruling of the local land office against him, and cancelled his entry.

Plaintiff filed a petition for review, which was denied, and the case was finally closed, the entry of defendant "reinstated, and his rights in and to said tracts were held to be both prior and superior to those of this plaintiff."

Defendant submitted his final proofs, and prior to the commencement of the suit obtained a patent conveying to him the tract in question, and holds the legal title thereto.

The petition alleges the superiority of plaintiff's right to defendant's right, and that by a proper application of the law to the facts as proved in said cause and found by the decisions of the land office the claim of the plaintiff "should have been finally held prior and superior to the claim of said defendant, and the patent conveying title to said tract should and would have been made and delivered" to plaintiff. The misapplication of the law, plaintiff alleges, consisted in the dif-

ferent conclusion drawn from the facts in the decision of July 3, 1900, in which the improvements put upon the land by defendant were declared sufficient, from that deduced in the decision of June 11, 1898, in which the improvements were decided to be insufficient to initiate a valid right of settlement. The last opinion is quoted from as follows:

"After a thorough examination of the testimony, the department is of the opinion that the acts of Coate were insufficient to hold the land against the soldier's declaratory filing of Greenameyer.

"If it should be conceded that everything claimed to have been done by Coate in the way of settlement were true, his said acts would not, in the judgment of this department, constitute him a *bona fide* settler prior to the 19th day of September, 1893, when the defendant made his declaratory statement of record."

And it is alleged that defendant—

"Coate reached the land between one and two o'clock on the afternoon of the opening and remained on or adjacent to the claim until the 20th, four days. All that he did in these four days was to stick his flag and dig a hole which he calls a starting of a well, two feet deep and two and a half or three feet across. He then left and went back to his home in Kansas, 150 miles distant. The digging of this hole would not require more than an hour's labor by one man. This was all he did between the 16th and 20th, while he remained on or near this claim, to his return to Kansas, the rest of his time he spent 'watching people off' of the claim and in going to Newkirk on the 19th to 'file by mail.' He did not return to the claim after leaving on the 20th of September until the 22d of October, and his return at that time was due to the fact that he received a letter from one White, stating a soldier had filed on the land."

It is alleged that the two decisions were made upon "precisely the same state of facts;" that the decision of June 21, 1898, and October 5, 1898, correctly applied the law, and that of July 3, 1900, reversing the prior decisions, misapplied the law.

For a second cause of action plaintiff alleged the foregoing facts, and further alleged that fraud and deceit were practiced upon the land office by defendant, which caused the defeat of plaintiff in the litigation, and that by cunning and deceit defendant so concealed his fraudulent practices from plaintiff that the latter was unable to procure evidence to prove the fraud in the contest suit. That about the first of December, 1893, the plaintiff learned that defendant was the owner of and in possession of 160 acres of land in Morris County, Kansas; that he obtained an abstract of the "registry records" of Morris County, which showed that defendant was owner of 180 acres of land, and July 9, 1894, he further learned that in January of that year defendant had fraudulently placed on record a deed for the land to his son-in-law, to enable defendant to make proof before the Land Department, and that plaintiff was unable to obtain proof thereof in time to use in said contest. That the nature of defendant's fraud was such that he could and did conceal it from plaintiff and the Land Department; that the deed, while it was executed upon the twenty-seventh of January, 1894, was antedated so as to appear to have been made August 30, 1893, and that by these fraudulent means defendant caused it to appear that he had sold and conveyed the land on the thirtieth of August, 1893, whereas he continued to own the same until January, 1894, and was therefore disqualified from taking and holding any interest in the land involved in the action. And it is alleged that defendant introduced in evidence in the contest cause a certified copy or statement from the records of Morris County, in order to deceive the Land Department and defraud plaintiff, and to establish that defendant had the necessary qualifications to make entry and settlement upon the land.

It is alleged that plaintiff has but recently discovered the "evidence to prove the foregoing charge of fraud, concealment and imposition, and is now able to prove the facts as to both as set forth." Other facts will appear in the opinion.

Mr. John W. Adams, Mr. Kos Harris and *Mr. William E. Keith*, for appellant:

A party by acquiescing in, or acknowledging the title of another, or standing by and seeing another making costly improvements or recognizing a claim or lien of another, is estopped from subsequently disputing its validity. 2 Herman on Estoppel, § 1069; *Broyles* v. *Nowlin*, 59 Tennessee, 191; *Moale* v. *Baltimore*, 56 Maryland, 496; *Hart* v. *Huguet*, 33 La. Ann. 362; *Betts* v. *Worth*, 32 N. J. Eq. 32.

Coate could have had no right to a patent, if he had not filed thereon in the manner provided by the statute. It was, therefore, a misapplication of the law to receive or consider proof denying the soldier's preference right, once solemnly recognized in the very filing made by Coate, without which he could have no right under the facts in the contest case.

The allegations of the petition present such a case of fraud, cunning and deceit as will warrant a court of equity to grant relief. *Johnson* v. *Towsley*, 13 Wall. 72, 86; *Vance* v. *Burbank*, 101 U. S. 514; *Craig* v. *Leitensdorfer*, 123 U. S. 212; *Gonzales* v. *French*, 164 U. S. 342; *Quimbie* v. *Conlan*, 104 U. S. 425; *Lytle* v. *Arkansas*, 22 How. 203; *Calhoun* v. *Violet*, 173 U. S. 63.

The legal title has passed from the Government, and the plaintiff could not obtain any relief in the Land Department, but in cases of this kind, where a patent has been wrongfully or fraudulently obtained, equity will treat the fraudulent patentee as a trustee for the party against whose rights the fraud has operated and decree a transfer of the legal title to the party who, but for the wrong or fraud, would have received the title. *In re Emblem*, 161 U. S. 52; *Johnson* v. *Towsley*, 13 Wall. 72; *Moore* v. *Robbins*, 96 U. S. 530; *Marquez* v. *Frisbie*, 101 U. S. 473; *St. Louis Smelt. & Refining Co.* v. *Kemp*, 104 U. S. 636; *Steel* v. *St. Louis Smelting Co.*, 106 U. S. 447; *Monroe Cattle Co.* v. *Becker*, 147 U. S. 47; *Turner* v. *Sawyer*, 150 U. S. 578; *Emblem* v. *Lincoln Land Co.*, 184 U. S. 659.

Mr. W. S. Cline and *Mr. C. L. Pinkham* for appellee:

The question of what are sufficient acts of good faith on the part of one settling upon government land, and what particular acts are sufficient evidence of the continuance of an original act of settlement which segregates the tract settled upon, must necessarily vary with the varying circumstances of each particular case, and the determination of such question must be left to the judgment of those tribunals which are established for the purpose of disposing of the public land; and when such tribunals determine in good faith that the law has been complied with in a particular case, their determination is final. *Moore* v. *Robbins*, 96 U. S. 530; *Marquez* v. *Frisbie*, 101 U. S. 473; *Burfenning* v. *C., St. P., M. & O. Ry. Co.*, 163 U. S. 323; *Vance* v. *Burbank*, 101 U. S. 514; *Quinby* v. *Conlan*, 104 U. S. 420; *Steel* v. *Smelting Co.*, 106 U. S. 447; *Baldwin* v. *Starks*, 107 U. S. 463; *De Cambra* v. *Rogers*, 189 U. S. 119.

If there is any evidence which tends, in any degree, however slight, to support the conclusion of the Secretary as announced in his opinion, then such conclusions become final, and a court of equity will not interfere.

The findings of Secretary Bliss were not ultimate findings of fact in said contest proceedings. While said contest proceeding was pending before the department, the Secretary of the Interior granted the petition for rehearing of the defendant, and after a retrial of the contest case, and on the facts adduced on the retrial of said contest it was found by the land tribunal that the defendant was entitled to the land.

The department merely reconsidered a question passed upon in the progress of the cause. The findings of Secretary Hitchcock became and are the findings of ultimate facts, finally reached in said contest. See *Potter* v. *Hall*, 189 U. S. 292.

As to the contention of appellant that fraud and imposition were practiced upon him and upon the Land Department, the appellant has not brought himself within the rule under which courts of equity will grant relief. *Vance* v. *Burbank*, 101 U. S. 514; *De Cambra* v. *Rogers*, 189 U. S. 119; *United States* v.

Throckmorton, 98 U. S. 65; *Friese* v. *Hummel et al.*, 37 Pac. Rep. 458; *Estes* v. *Timmons*, 12 Oklahoma, 537; *S. C.*, 73 Pac. Rep. 303.

The fraud practiced which is sufficient to set aside the final judgment is one that arises extrinsically, that prevents a party from having a fair trial, or having any trial for the development of the facts, and not a case where a full, fair and free trial is had or tendered, wherein the person alleged to have been defrauded was present in person and by attorney, and heard and saw what is alleged to have been the perpetration of a fraud, and had then and there the opportunity to refute it, which he failed to do, or, believing himself to have successfully done it, submits his cause for final determination. In such case, the conclusion reached is final. See *Hass* v. *Billings* (Minn.), 43 N. W. Rep. 797, affirmed, *Wilkins* v. *Sherwood*, 56 N. W. Rep. 591; *Gray* v. *Barton* (Mich.), 23 N. W. Rep. 813; *Lee* v. *Johnson*, 116 U. S. 48; *Cothausen* v. *Kerting* (C. C.), 29 Fed. Rep. 821; *Friese* v. *Hummel* (Ore.), 37 Pac. Rep. 458.

MR. JUSTICE MCKENNA, after stating the case as above, delivered the opinion of the court.

The case presents apparently contradictory decision between two Secretaries of the Interior and plaintiff contends upon the same set of facts. But this contention is not sustained by the record. The first decision of the local office was adverse to the plaintiff, but the decision was reversed by the Interior Department, the Commissioner and the Secretary of the Interior taking a different view of the facts from that taken by the local land office. But a rehearing was granted, and while in the opinion granting it the Secretary repeated his view of the facts, further testimony was allowed to be introduced. Further testimony was introduced, and the local office found that, while it was conflicting—

"the preponderance of it showed: First. That the contestant settled on the land in controversy on the afternoon of Septem-

ber 16, 1893; that he put up a flag and commenced a well; that he remained thereon until the 20th of September, 1893; that he returned in October, 1893, and built a small house, put up a few trees and had some breaking done; that he again went to Kansas in November, 1893, and remained there until February, 1894, when he again returned to the land in controversy and built a large and better house; that he has resided [upon], improved and cultivated part of the said land from that time to the present; that he has substantially complied with all the requirements of the homestead law.

"Second. We find that his absence from the land from November, 1893, to February, 1894, was excusable because of his financial and physical condition.

* * * * * * * *

"Fourth. We find that there was no fraud in conveying the land formerly owned by the contestant to his son-in-law some months before the opening of the country to settlement.

"Fifth. That the settlement rights of the contestant were commenced before the defendant filed his soldier's declaratory statement, and that the said rights so acquired have been followed up as required by law."

The office recommended that the entry of the defendant "be permitted to stand." The finding and decision were successively affirmed by the Commissioner of the General Land Office and the Secretary of the Interior, in an elaborate opinion, in which the testimony was quoted and commented upon. And to these decisions we must look as the ultimate action of the Department. It is of no legal consequence that different views were expressed in other decisions. It is not contended that Secretary Hitchcock, when he rendered the last decision, did not have complete jurisdiction of the case. It seems to be contended that he was bound by the facts found by his predecessor, Mr. Bliss, and that this court is likewise so bound. The contention is untenable. *Potter* v. *Hall*, 189 U. S. 292. In that case it was said:

"The fact that the final conclusion as to the ultimate facts

reached by the Department differed from the conception of such ultimate facts entertained by the Department in previous stages of the controversy, affords no ground for disregarding the conclusion of ultimate fact finally reached, which was binding between the parties."

But besides, as we have seen, additional testimony was taken. It was upon that testimony, as well as upon that which was before Secretary Bliss, that the decision of Secretary Hitchcock was based. It is true the petition alleges that such decision was made upon "precisely the same state of facts" as that of Secretary Bliss, but the allegation is contradicted by the exhibits which are attached to the petition and expressly made part thereof.

The contentions upon which plaintiff bases his second cause of action are equally without merit. The issue of fraud which plaintiff made upon the ownership of land in Kansas and the conveyance thereof to his son-in-law was passed on by the Land Department and decided adversely to plaintiff. There was evidence other than copies of the record. The integrity of the deed by the defendant to his son-in-law was challenged. The evidence is not recited in the opinion of the local land office. It is recited in the opinion of Secretary Hitchcock, and it tended to show that the deed was a consummation of transactions between defendant and his son-in-law which established its validity, and which were inconsistent with the supposition of its having been antedated. However, the issue was met and decided upon testimony submitted, and no fact is alleged which supports the statement that plaintiff was prevented from exhibiting his whole case. He had certainly plenty of time for preparation. The land was opened to settlement September 3, 1893. On the nineteenth of that month plaintiff filed his soldier's declaratory statement upon the land. Defendant made his homestead entry November 24, 1893, and on the twenty-eighth of March, 1894, instituted a contest against plaintiff, which was not heard until October 18, 1895. A decision was rendered on such contest October 24, 1895.

The progress of the case was somewhat slow in the Interior Department, the rehearing applied for by defendant being granted February, 1899, five years after the institution of the contest. It thus appears that plaintiff had from the twenty-eighth of March, 1894, until October 18, 1895, to prepare for the first hearing upon the contest, and had over five years to the final hearing, in 1899. And he alleges that he had learned as early as January, 1894, that the deed of defendant to his son-in-law was fraudulent. It is true he attempted to show diligence in his investigations, but all he did was to visit Morris County in 1894, and to send an attorney there in 1899, who discovered nothing. And he finally alleges, that on or about the first of March, 1901, which was after the proceedings in the Land Department had closed, he learned "of the existence of proof sufficient to substantiate the allegations of fraud and imposition on the defendant's part." From whom or how he learned it or what defendant did to keep it from him, is not alleged. These allegations only show that the plaintiff has further evidence upon one of the issues made before the Land Department, which he had abundance of time and opportunity to discover and present, and no fact is alleged that anything was done to prevent him from discovering or presenting it, except the general allegation that cunning and deceit were practiced upon him. Of what they consisted he does not allege, or why they endured and were successful for over five years and until the case was closed in the Land Department.

The case therefore falls within the doctrine of *Vance* v. *Burbank*, 101 U. S. 514, 519; *De Cambra* v. *Rogers*, 189 U. S. 119; *Estes* v. *Timmons*, 199 U. S. 391; *United States* v. *Throckmorton*, 98 U. S. 65; *Friese* v. *Hummel* (Ore.), 37 Pac. Rep. 458. In *Vance* v. *Burbank, supra*, this court said, expressing the principle that is to be applied in cases like that at bar:

"It has also been settled that the fraud in respect to which relief will be granted in this class of cases must be such as has been practiced on the unsuccessful party, and prevented him from exhibiting his case fully to the department, so that it may

properly be said there never has been a decision in a real contest about the subject-matter of inquiry. False testimony or forged documents even are not enough, if the disputed matter has actually been presented to or considered by the appropriate tribunal. *United States* v. *Throckmorton*, 98 U. S. 61; *Marquez* v. *Frisbie*, *supra*. The decision of the proper officers of the department is in the nature of a judicial determination of the matter in dispute."

The cases adduced by plaintiff are consistent with that principle. They only declare the general doctrine that the holder of a patent may be declared to hold the same as trustee for another when he has procured it by an error of law committed by the Land Department, the facts being undisputed, or by fraud or imposition upon that Department. Of the character of the fraud and in what way or under what circumstances exerted in order to be a ground of relief, the cases we have cited are examples.

Decree affirmed.